SUPREME COURT, U. S.
FILE
APR 19
MICHAEL RODAK, JR.

Nos. 73-300 and 73-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
Petitioners,
v.
ROBERT BUSTOS, ET AL.

CRISTOBAL CARDONA, ET AL.,
Petitioners,
v.
WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ

BRUCE J. TERRIS
1908 Sunderland Place, N.W.
Washington, D. C. 20036

JOHN W. KARR
625 Washington Building
Washington, D. C. 20005

JOSEPH ONEK
1751 N Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents in No. 73-300 and Petitioners in No. 73-480

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	6
SUMMARY OF ARGUMENT	11
ARGUMENT	18
I. COMMUTERS MUST HAVE AN IMMIGRANT VISA AND A LABOR CERTIFICATION FROM THE SECRETARY OF LABOR IN ORDER TO ENTER THE UNITED STATES	18
A. Commuters Are Required to Obtain Immigrant Visas In Order To Enter The United States	19
1. The Plain Language of the Immigration and Nationality Act and of the Regulations Require Commuters to Obtain Immigrant Visas	19
a) The Commuter Is Not A "Returning Resident Immigrant" of the United States Under Section 211(b) Because He Does Not Reside in this Country	20
b) The Commuter Alien Is Not "Lawfully Admitted for Permanent Residence" or "Returning From a Temporary Visit Abroad" Under Section 101(a)(27)(B) When He Re-enters the United States	30
2. The Admission of Commuters Without Visas Cannot Be Justified on the Ground of Administrative Practice or Congressional Reenactment	40

TABLE OF CONTENTS—Continued

Page

a) Administrative Practice and Congressional Reenactment Cannot Be Used to Contradict the Clear and Unambiguous Language of the Act 40

b) The Service's Alleged Administrative Practice Has Admittedly Been Invented Without Support in Applicable Federal Statutes 45

c) The Commuter Practice Is Not Supported By Long, Clear, and Consistent Administrative Practice 47

B. Section 212(a)(14) of the Act Requires That Commuters Obtain A Labor Certification From the Secretary of Labor Relations Before Entering the United States 65

1. The Language of Section 212(a)(14) Applies to Commuters 65

2. The Purpose of Section 212(a)(14) Supports Its Applicability To Commuters 66

3. The Legislative History of Section 212(a)(14) Supports Its Applicability of Commuters 69

4. The Board of Immigration and Naturalization Appeals Has Held That Section 212(a)(14) Applies to Commuters 71

II. MOST COMMUTERS ARE PROPERLY NON-IMMIGRANTS WHO MAY NOT BE ADMITTED INTO THE UNITED STATES UNLESS THE SECRETARY OF LABOR DETERMINES THERE IS A LABOR SHORTAGE 73

A. Most Commuters Coming to the United States Are Properly Non-Immigrants 74

TABLE OF CONTENTS—Continued

Page

B. Commuters, Who Originally Entered As Immigrants But Are Properly Non-Immigrants Should Be Reclassified As Non-Immigrants.. 85

III. THE ISSUES IN THIS CASE SHOULD BE RESOLVED BY THIS COURT 91

CONCLUSION 93

APPENDIX A 94

APPENDIX B 98

TABLE OF AUTHORITIES

CASES: Page

Addison v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944) 20
Amalgamated Meat Cutters v. *Rogers*, 186 F. Supp. 114 (D. D.C., 1969) 44, 71-72, 103
Biddle v. *Commissioner*, 302 U.S. 573 (1938) 41
Bonetti v. *Rogers*, 356 U.S. 691 (1958) 86
Boske v. *Comingore*, 177 U.S. 459 (1900) 40
Burnett v. *Chicago Portrait Co.*, 285 U.S. 1 (1932) 47, 57
Cermeno-Cerna v. *Farrell*, 291 F. Supp. 521 (N.D. Cal., 1968) 46
Commissioner v. *Glenshaw Glass*, 348 U.S. 426 (1955) 55
Correa, Petition of, 79 F. Supp. 265 (W.D. Tex., 1948) 90
Gayle v. *Wilder*, 51 U.S. 477 (1850) 42
Gilbert v. *David*, 235 U.S. 561 (1915) 36
Helvering v. *City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) 42
Helvering v. *Hallock*, 309 U.S. 106 (1941) 47, 55, 57
Helvering v. *N. Y. Trust Co.*, 292 U.S. 455 (1934) .. 42
Hess v. *Esperdy*, 234 F. Supp. 909 (S.D. N.Y. 1964) 77
Houghton v. *Payne*, 194 U.S. 88 (1904) 41
Hurst v. *Nagle*, 30 F.2d 346 (C.A. 9, 1929) cert-tiorari denied, 279 U.S. 861 34
International Mercantile Marine Co. v. *Elting*, 67 F.2d 886 (C.A. 2, 1933) 34, 35
Iselin v. *United States*, 270 U.S. 245 (1945) 47, 57
Karnuth ex rel. Albro v. *United States*, 279 U.S. 231 (1930) 43, 84-85, 101
Koshland v. *Helvering*, 298 U.S. 444 (1936) 41
Louisville & N.R. Co. v. *United States*, 282 U.S. 740 (1931) 41
Mitchell v. *United States*, 88 U.S. 350 (1874) 36
Pennington v. *Coxe*, 6 U.S. (2 Cranch) 34 (1804) .. 42
Richards v. *United States*, 369 U.S. 1 (1962) 42

TABLE OF AUTHORITIES—Continued

	Page
Sam Andrews' Sons v. *Mitchell*, 457 F.2d 745 (C.A. 9, 1972)	89
Sanfords Estate v. *Commissioner*, 308 U.S. 39 (1939)	41
Savings Bank v. *United States*, 86 U.S. (19 Wall.) 227, (1873)	41
Savorgnan v. *United States*, 338 U.S. 491 (1950)	27
Serpico v. *Trudell*, 46 F.2d 669 (D. Vt. 1928)	34
Service v. *Dulles*, 354 U.S. 363 (1957)	40, 47
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953)	86
Toucey v. *New York Life Insurance Co.*, 314 U.S. 118 (1941)	41
Transatlantic Italiana v. *Elting*, 66 F.2d 542 (C.A. 2, 1933)	7, 34
United States ex rel. Katric v. *Reimer*, 25 F. Supp. 925 (S.D. N.Y. 1938)	34
United States v. *Day*, 21 F.2d 307 (C.A. 2, 1927)	34
United States v. *Kirpatrick*, 22 U.S. (9 Wheat.) 720 (1924)	41
United States v. *Missouri Pacific R. Co.*, 278 U.S. 269 (1929)	20, 41, 42, 47, 57
United States v. *Parisi*, 24 F. Supp. 414 (D. Md., 1938)	34
United States v. *Temple*, 108 U.S. 97 (1881)	20
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	40, 47
Volkswagenwerk Aktiengesellschaft v. *F.M.C.*, 390 U.S. 211 (1968)	41
Wright, Petition of, 42 F. Supp. 306 (E.D. Mich., 1941)	90
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1940)	55

ADMINISTRATIVE DECISIONS:

Matter of Bailey, 11 I. & N. 466 (1965)	16, 52-53, 72
Matter of Burciaga-Salcedo, 11 I. & N. 665 (1966)	21, 46
Matter of Bustillos-Ruiz, 10 I. & N. 60 (1962)	21
Matter of C—, 1 I. & N. 631 (1943)	36

TABLE OF AUTHORITIES—Continued

	Page
Matter of C---- E----, 7 I. & N. 599 (1957)	22
Matter of Estrada-Tena, 12 I. & N. 422 (1967)	86
Matter of Flores-Maldonado, 10 I. & N. 22 (1962)	21
Matter of Gerhard, 12 I. & N. 556 (1967)	46
Matter of Hoffman-Arvayo, 13 I. & N. 750 (1971)	15, 46
Matter of H---- O----, 5 I. & N. 716 (1954)	46
Matter of J---- P----, 9 I. & N. 591 (1962)	46, 72
Matter of L----, 4 I. & N. 454 (1951)	21, 89
Matter of L----, 8 I. & N. 643 (1960)	46, 52
Matter of Marcos, 11 I. & N. 740 (1966)	88
Matter of M----, 5 I. & N. 642 (1954)	88
Matter of M---- D---- S----, 8 I. & N. 209 (1958)	46, 89
Matter of Moore, 13 I. & N. 711 (1971)	21, 86
Matter of M---- P----, 9 I. & N. 747 (1962)	88
Matter of S----, 1 I. & N. 646 (1943)	36
Matter of S----, 6 I. & N. 392 (1954)	88
Matter of Smith, 11 I. & N. 738 (1966)	89
Matter of T----, 6 I. & N. 778 (1955)	88
Matter of Wighton, 13 I. & N. 683 (1970)	89

STATUTES:

Act of February 5, 1917, 39 Stat. 875	
Sec. 3, 39 Stat. 875	98
Sec. 23, 39 Stat. 892	98
Act of May 19, 1921, 42 Stat. 5	
Sec. 2(a), 42 Stat. 5	98
Sec. 2(d), 42 Stat. 5, 6	34
Act of May 11, 1922, 42 Stat. 540	
Sec. 2, 42 Stat. 540	98
Act of August 4, 1942, 56 Stat. 1759	104
Act of July 12, 1951, 65 Stat. 119	104
Act of October 3, 1965, 79 Stat. 911, *et seq.*:	
Sec. 21(e), 79 Stat. 921	44, 49

TABLE OF AUTHORITIES—Continued

Page

Alien Registration Act of 1940 ("Smith Act")

54 Stat. 670 58
Sec. 104, 54 Stat. 1138 27

Immigration Act of 1924, 43 Stat. 153, *et seq.*:

Sec. 3, 43 Stat. 153 ..... 84, 99
Sec. 4(b), 43 Stat. 155 ..... 34, 58
Sec. 10, 43 Stat. 158-159 99
Sec. 13(b), 43 Stat. 161-162 ..... 58-59, 99

Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101, *et seq.*:

66 Stat. 181, Sec. 211(b) 11, 33, 59
66 Stat. 183, Sec. 212(a)(14) 49, 66-67, 103
Sec. 101(a), 8 U.S.C. 1101(a) 3
Sec. 101(a)(6), 8 U.S.C. 1101(a)(6) 32, 103
Sec. 101(a)(15), 8 U.S.C. 1101(a)(15) 74
Sec. 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H) 2-3, 8, 10, 17, 44, 52, 75-76, 82, 85-86, 90, 102
Sec. 101(a)(15)(H)(ii), 8 U.S.C. 1101(a)(15)(H)(ii) 50, 57, 60, 73, 75, 80, 83, 105
Sec. 101(a)(20), 8 U.S.C. 1101(a)(20) 12-13, 17, 30-31, 33, 60, 87-88
Sec. 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A) 16, 66, 68, 103
Sec. 101(a)(27)(B), 8 U.S.C. 1101(a)(27)(B) 2, 8, 12-13, 20, 25, 29-30, 32, 34, 37, 39, 42, 58-59, 68
Sec 101(a)(33), 8 U.S.C. 1101(a)(33) 11, 20, 26, 59, 103
Sec. 203(a)(2), 8 U.S.C. 1153(a)(2) 31
Sec. 211, 8 U.S.C. 1181 ..... 4, 13, 19-20, 37
Sec. 211(a), 8 U.S.C. 1181(a) 18, 39
Sec. 211(b), 8 U.S.C. 1181(b) 2, 7, 12-14, 18, 20, 23-24, 26, 29, 30, 39-40, 42, 59, 60, 83, 103, 106

TABLE OF AUTHORITIES—Continued

Page

Sec. 212(a), 8 U.S.C. 1182(a) 4
Sec. 212(a)(14), 8 U.S.C. 1182(a)(14) 8, 19, 31, 44, 49, 54, 59, 65-72, 103, 105-106
Sec. 212(a)(20), 8 U.S.C. 1182(a)(20) 39
Sec. 212(g), 8 U.S.C. 1182(g) 32
Sec. 212(h)(i), 8 U.S.C. 1182(h)(i) 31
Sec. 214(a), 8 U.S.C. 1184(a) 15, 16, 18-19, 83
Sec. 241, 8 U.S.C. 1251(f) 31
Sec. 316, 8 U.S.C. 1427 89

REGULATIONS AND RULES:

8 C.F.R. 110.6 (1947 Supp.) 36, 103
8 C.F.R. 211.1 4
8 C.F.R. 211.1(b)(1) 8, 11, 14, 20, 37-40, 47, 89
8 C.F.R. 211.2 37
8 C.F.R. 214.2(h)(2)(ii) 54, 74
8 C.F.R. 221.1 104
20 C.F.R. 602.10 74
20 C.F.R. 602.10(a) 74
20 C.F.R. 602.10(b) 74
22 C.F.R. 4.25(b) 19
29 C.F.R. 60.1 66
29 C.F.R. 60.2(a)(2) 8, 19, 66, 68
17 Fed. Reg. 11483 ..... 36, 103
21 Fed. Reg. 832 37
22 Fed. Reg. 6377 ..... 37, 104
36 Fed. Reg. 2463 66
General Order 86, April 1, 1927 .....84, 100-101

Immigration Rules of May 1, 1917

Rule 12, Subd. 9 100
Rule 13, Subd. 3 100

Immigration Rules of 1924

Rule 9, Subd. G 34

TABLE OF AUTHORITIES—Continued

Page

Immigration Rules of July 1, 1925

Rule 3, Subd. R 100

Immigration Rules of March 1, 1927

Rule 3, Subd. Q 99

Immigration Rules of January 1, 1930

Rule 3, Subd. C 36, 103
Rule 3, Subd. Q 101

LEGISLATIVE MATERIALS:

H. Rep. No. 745, 89th Cong. 1st Sess. (1965) 23, 25, 69, 105-106
H. Rep. No. 1365, 82d Cong. 2d Sess. (1952) 27, 33, 67, 75, 102
S. Rep. No. 1515, 81st Cong. 2d Sess. (1950) 58, 76
S. Rep. No. 1137, 82d Cong. 2d Sess. (1952) 67, 102
S. Rep. No. 748, 89th Cong. 1st Sess. (1965) 23, 105-106
S. Rep. No. 83, 91st Cong. 2d Sess. (1969) 23
109 Cong. Rec. 15187, 15203, 23155, 23222 (1963).. 79-80
111 Cong. Rec. 21541 (1965) 70
115 Cong. Rec. 7752 (1967) 63
116 Cong. Rec. 5954, 5957, 5964 (1970) 94, 96, 97
117 Cong. Rec. 7670 (1971) 64
Hearings Before the Senate Committee on Immigration, to Clarify the Law Relating to the Temporary Admission of Aliens to the United States, 70th Cong. 2d Sess. (1929) 99, 100
Hearings Before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, Unpublished Transcript on Alien Commuter "Green Card" System, 90th Cong. 1st Sess. (1967) 54, 61, 70, 71, 82, 87, 88, 97
Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary, "Review of the Operation of the Immigration and Nationality Act

TABLE OF AUTHORITIES—Continued

Page

as Amended by the Act of October 3, 1965," 90th Cong. 2d Sess. (1968) 67, 105

Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, Migrant and Seasonal Farmworkers Powerlessness; Part V: Border Commuter Farm Labor Problem, 91st Cong. 1st Sess. (1969) 22, 51-52, 54, 61, 64, 68, 82, 94, 96

Hearings Before the Special Subcommittee on Labor of the House Committee on Education and Labor, on Employment of "Green Card" Aliens During Labor Disputes, 91st Cong. 1st Sess. (1969) 22, 51, 61, 81, 96, 97, 104, 107

Hearings Before a Subcommittee of the House Government Operations Committee, Immigration and Naturalization Services Regional Office Operations, Part 1, 93d Cong. 1st Sess. (1973) .. 45

Hearings Before House Committee of the Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Part II: The Mexican Farm Labor Problem, 88th Cong. 1st Sess. (1963) 13, 24, 33, 48, 50, 60, 61, 84, 87, 88, 90, 98, 99, 101

Illegal Aliens, A Review of Hearings Conducted During the 92d Congress by Subcommittee No. 1, House Judiciary Committee, 93d Cong. 1st Sess. (1973) 21

Joint Hearings Before the Subcommittee of the Committee on the Judiciary on S.716, H.R. 2379 and H.R. 3816, "Bills to Revise the Laws Relating to Immigration, Naturalization and Nationality," 82d Cong. 1st Sess. (1951) 76

Report on the Administration of the Immigration and Nationality Act by the House Committee on the Judiciary, Part II (1955) 78

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

Besterman, "Commentary on the Immigration and Nationality Act" in 8 U.S.C. 1 to 1280 (1954) 86
Department of Labor, Rural Manpower Development (Fall, 1973) 74
1 Gordon and Rosenfield, *Immigration Law and Procedure* (rev. ed. 1973):
Sec. 2.14(a) 77, 85
Sec. 2.19 ..... 36, 86
Sec. 2.30 89
Sec. 2.40 68
Sec. 2.86 45
Sec. 6.9 79
1 Gordon and Rosenfield, *Immigration Law and Procedure* (1973 Supp.):
Sec. 2.19 ..... 7, 46
Hart & Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) .. 55, 56
Immigration and Naturalization Service, Operations Instructions, Sec. 211.3 (March 28, 1973) .. 89, 90
Kennan, Kossuth & Kent, *A Treatise on Residence and Domicile* (1934) 36
North, "The Border Crossers: People Who Live in Mexico and Work in the United States," prepared for the Manpower Administration, Department of Labor (April 1970) 23, 95
Report of the Secretary of Labor, "Year of Transition, Seasonal Farm Labor—1965," (1965) .. 50, 80, 81
Report of the Select Commission on Western Hemisphere Immigration (1968) 50-52, 61, 78, 90, 94, 95, 99, 105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

ROBERT BUSTOS, ET AL.

No. 73-480

CRISTOBAL CARDONA, ET AL.,
Petitioners,

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-30) is reported at 481 F.2d 479. The district court issued no opinion.

JURISDICTION

The petitions for writs of certiorari were granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 73-300

1. Whether Mexican aliens who commute to the United States to work only *during the agricultural season* and who do not maintain residences in this country when they return to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has "a residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States" to perform temporary services or labor" (8 U.S.C. 1101(a)(15)(H)).

No. 73-480

1. Whether Mexican aliens who commute *daily* to the United States to work and who do not maintain residences in this country when they return each evening to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has a "residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform temporary services or labor" (8 U.S.C. 1101 (a) (15) (H)).

STATUTES AND REGULATIONS INVOLVED

Section 101(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a), provides in pertinent part:

§ 1101. Definitions.

(a) As used in this chapter—

* * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.

* * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent

residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

Section 211 of the Act, 8 U.S.C. 1181, provides:

§ 1181. Admission of immigrants into the United States.

(a) Except as provided in subsection (b) no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General. * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

Section 212(a) of the Act, 8 U.S.C. 1182(a), provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. * * *

* * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a) * * *.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Large numbers of Mexican nationals work as agricultural laborers in Southwestern United States, particularly California, Arizona, and Texas.[1] These Mexican nationals originally entered the United States as immigrants in order to become permanent resident aliens. They fall into three categories:

First, some of these Mexican nationals live permanently in the United States. While such actual permanent residents of the United States may visit Mexico or other places outside of the United States, they have homes which they continue to own or rent in this country. This litigation does not affect the status of these nationals.

Second, some of these Mexican nationals do not live in the United States during any period of the year. These nationals are "daily commuters," who cross the border daily from homes in border areas of Mexico to work in the fields in border areas of the United States and return to Mexico each evening. They may commute daily only during the agricultural season.

Third, some of the Mexican nationals are seasonal workers who come to the United States for a number of months—usually four to six—during the agricultural season each year.[2] These seasonal commuters return after the agricultural season to their permanent homes in Mexico which they own or rent or where they stay with friends or relatives. They may come to a single place of employment in the United States or move from one

---

[1] Appendix A, pp. 94-97 below, reviews studies concerning the serious effect which the daily and seasonal commuters have on the wages, working conditions, and employment of domestic farm labor.

[2] The two kinds of commuters are briefly described in Gordon and Rosenfield, *1 Immigration Law and Procedure*, Sec. 2.19 (1973 Supp.).

American employer to another during the agricultural season. They may return to the same place or places of employment each year or work wherever an opportunity happens to arise.[3]

Robert Bustos and Lupe Murquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit

---

[3] The *amicus curiae* brief of Bud Antle, Inc. suggests that the facts relating to commuters are more complex than the two categories described by the court of appeals and in this brief. This is doubtless true in the sense that the question whether a particular commuter has his permanent residence in the United States or Mexico depends on the particular facts. See *Transatlantica Italiana* v. *Elting*, 66 F.2d 542 (C.A. 2, 1933). However, once a determination is made, based on the facts of each case, that the alien's residence is in Mexico, there are two major categories of commuters, daily and seasonal.

abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is sufficient and the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants. The Act includes among the categories of non-immigrants "an alien having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor." 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has not issued such certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations prohibiting commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1), by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists.

On May 13, 1970, the district court granted the motion of four Texas farm workers to intervene as plaintiffs on behalf of themselves and all farm workers in Texas.[4] On June 8, 1970, the parties agreed to a stipulation of facts (Gov. Pet. App. D, pp. 34-37). On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs for summary judgment, and dismissed the complaint (Gov. Pet. App. C, p. 33).

On appeal, plaintiffs renewed their arguments on all the claims described above. On April 16, 1973, the court of appeals held that, with regard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contended" (Gov. App. A, p. 28). The court said that since the practice as to daily commuters began in 1927 and has continued for 45 years, and since Congress has never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 27).[5] The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (Gov. Pet. App. A, p. 21). Moreover,

---

[4] The plaintiffs and plaintiff-intervenors will be referred to herein as the plaintiffs.

[5] Appendix B, pp. 98-107 below, sets forth the history of the daily and seasonal commuter practice.

since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 22-23). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strengthened the Immigration Act of 1965 to safeguard American labor (*id.* at 18-21).

On April 30, 1973, the plaintiffs filed a Petition for Clarification and Rehearing limited to two points. First, they contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. They asked, however, that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, they requested that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (Pl. Pet. App. D, pp. 37-38). However the court explicitly did not determine the merits of the arguments advanced by the plaintiffs. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion,

first by the district court, and if necessary by this court on appeal." [6]

SUMMARY OF ARGUMENT

I

The Immigration and Naturalization Service considers both daily and seasonal commuters as immigrants. If commuters are immigrants, they are required to have immigrant visas and labor certifications from the Secretary of Labor in order to enter the United States.

A. The plain language of the Immigration and Nationality Act and the Service's own regulations require commuters to obtain immigrant visas.

Section 211(b) of the Act allows only "returning resident immigrants" to enter without immigrant visas. Section 101(a)(33) defines "residence" to mean:

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

Seasonal commuters, who have no permanent home in the United States which they retain but have a permanent

---

[6] This case thus does not involve the question as to the meaning of the Service's strike breaker regulations, 8 C.F.R. 211.1(b)(1), since that issue was not decided below and was not presented in the petitions for writs of certiorari. This case even less presents the question argued by the *amici curiae* brief of the American Farm Bureau Federation, *et al.* (pp. 20-22), that the strikebreaker regulation is not authorized by the Immigration and Nationality Act since that issue was not raised by the complaint and has never been presented by any party at any stage of the case.

Similarly, contrary to the argument of the *amici curiae* (pp. 17-20), no questions are presented as to the rights of commuters to fair hearings before they can be excluded from the United States. If this Court determines that commuters cannot enter the United States without immigrant visas, aliens will of course be entitled to an opportunity to show that they are not commuters or, if they are, that they are entitled to visas.

home in Mexico, are not residents of the United States because they plainly have their "principal, actual dwelling place in fact" in Mexico. Daily commuters are likewise obviously not residents of the United States since they have no "dwelling place in fact" of any kind in the country. While the court below said that a daily commuter could be considered a resident of the United States because residence may mean his place of work, a commuter's place of work is not "his principal actual dwelling place in fact." Indeed, the Service admits that commuters are not residents of this country.

The Service contends that Section 211(b) does not require commuters to be "returning resident immigrants" at all in order to enter the United States because the Act states that "returning resident immigrants, defined in Section 101(a)(27)(B)" may enter without a visa. It argues that the commuter need only satisfy the requirements of Section 101(a)(27)(B) which, the Service says, requires only that the commuter have the status of being admitted for permanent residence in contrast to being actually a resident of this country. We submit that this interpretation of Section 211(b) reads the phrase "returning resident immigrants" entirely out of the Act.

Even if it is not an independent requirement, at the least, the phrase "returning resident immigrants" is persuasive as to the meaning Congress intended in Section 101(a)(27)(B). Congress would not have intended to define "returning resident immigrants" to include nonresidents. Thus, Section 211(b) shows that Congress intended Section 101(a)(27)(B) to be essentially the equivalent of "returning resident immigrants."

2. Commuters do not come within Section 101(a)(27)(B). That Section covers aliens who are "neither lawfully admitted for permanent residence" nor "returning from a temporary visit abroad." "Lawfully admitted for permanent residence" is defined by Section 101(a)(20)

of the Act as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant, such status not having changed." The status of commuters has changed because they are not residents. Moreover, any interpretation of Section 101(a)(20) to include commuters will produce obviously incongruous results under the many other sections of the Act which likewise refer to immigrants "lawfully admitted for permanent residence." Since the same definition is applicable to the entire Act, the Service's interpretation makes no sense in the context of the entire statute.

In any event, it is clear that commuters are not "returning from a temporary visit abroad" when they seek to enter the United States. Since the commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is not from the United States to Mexico but from Mexico to the United States. The courts have repeatedly held that a temporary visit abroad means an absence in a foreign country without relinquishment of domicile in the United States. The Service's General Counsel conceded in 1963 that a visit was an absence from "a more permanent place" and therefore that the commuter practice did not rely on Section 101(a)(27)(B) which referred to a "temporary visit abroad" but rather on Section 211 which referred to "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 169. Since Congress removed in 1968 the language of Section 211(b) on which the Service relied and referred to Section 101(a)(27)(B), commuters clearly may no longer enter the country without a visa under Section 211(b).

3. The Service's own regulations specifically provide that immigrants may enter this country without visas only if they have "an unrelinquished lawful permanent residence in the United States after a temporary absence abroad." 8 C.F.R. 211.1(b)(1). This regulation explicitly requires actual, unrelinquished residence in this country rather than merely the status of having been admitted for permanent residence. The regulation supports the plain meaning of Section 211(b) that it requires actual residence in the United States. Moreover, even independent of the language of Section 211(b) itself, that section allows aliens to enter the United States only if the Attorney General so provides and "under such conditions as may be by regulations prescribed." The Attorney General by regulations has allowed immigrants to enter without visas conditioned upon unrelinquished residence in this country.

4. The admission of commuters without visas cannot be justified on the ground of administrative practice or Congressional reenactment.

First, when, as here, the language of the statute is plain, it is of course controlling. Moreover, the language of the Act is further supported by the purpose of the immigration laws generally and of the specific provisions involved in this case to protect American labor from competition from low-wage foreign workers. Congress has significantly tightened the language of several of the relevant provisions both in 1952 and 1965 to carry out this purpose.

Second, the Service has often admitted that the practice is not authorized by any statute. It has repeatedly admitted that the commuter system is "a device of convenience," is an "amiable fiction," and "does not fit precisely within the statutory patterns." The Board of Immigration Appeals has concluded that commuters can enter without visas "based upon the fiction that their

presence in the United States while employed amounts to permanent residence in the United States." *Matter of Hoffman-Arrayo*, 13 I & N 750, 752, note 2 (1971).

Third, the commuter practice is not of long duration in any meaningful sense. The seasonal commuter practice began, as the Service's own brief shows, at the time the bracero system was ended in the early 1960's. While the daily commuter practice began in the 1920's, it was essentially then only an administrative convenience so that commuters did not have to obtain, and the Service did not have to issue, immigrant visas for each daily visit. Since there was no quota on Mexican nationals and no prohibition against them coming to this country because of a surplus of domestic labor, Mexican nationals could enter virtually without restriction. Consequently, the commuter system did not undermine any protection which had been afforded domestic labor. The daily commuter practice only had substantive content after 1952 when Congress passed Section 214(a) of the Act which prohibits the entry of immigrants who pose an economic threat to American labor. The commuter practice since that time and especially since a quota was imposed on Mexican immigrants in 1968 has allowed commuters to avoid these important provisions.

Fourth, the administrative practice is not consistent. We have seen that the Service has adopted a regulation directly inconsistent with the purported construction of the Act. The Department of Labor, which is equally involved in application of the immigration laws, has concluded that the commuter practice is illegal.

Fifth, there is no indication that Congress has ever approved the commuter system. While Congress did not adopt proposals to eliminate the system before 1952, there was little reason to end it at that time since the system only involved daily commuters and did not provide a

mechanism to undermine important statutory provisions designed to protect domestic labor. The only references to commuters in the legislative history of the Immigration and Nationality Act of 1952 are references in the Senate report which simply describe existing immigration practices. In 1952 and 1965, Congress tightened several provisions relating to the commuter practice for the purpose of protecting domestic labor. Since passage of the 1952 Act, Congressional leaders relating to immigration matters have repeatedly challenged the commuter system as in violation of law. Consequently, the history of the commuter practice and of Congress' response to it is, when considered most favorably from the standpoint of the Service, inconclusive.

B. Section 214(a) of the Act requires that commuters obtain a labor certificate before entering the United States. Section 214(a) applies to all immigrants who come within Section 101(a)(27)(A) which applies to "an immigrant who was born in an independent foreign country of the Western Hemisphere." Commuters cannot enter this country because the Secretary has found that the supply of domestic farm labor is sufficient and that the admission of farm laborers would adversely affect wages and working conditions of domestic workers. This construction of Section 214(a) is consistent both with its purpose to protect domestic labor and its legislative history showing that it applies to all workers entering this country. Moreover, the Board of Immigration Appeals has determined that Section 214(a) applies to commuters. *Matter of Bailey*, 11 I & N. 466, 471 (1965).

II

All seasonal commuters and those daily commuters who come to the United States only during the agricultural season are properly considered as non-immigrants.

A. Section 101(a)(15)(H) explicitly provides that "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor" is a non-immigrant. The only commuters who are properly considered as immigrants are those who come daily throughout the year. Any commuters covered by Subsection (H) could not enter the country since non-immigrants can not enter under that subsection unless the Secretary of Labor determines that "unemployed persons capable of performing such services or labor cannot be found in this country" and he has made no such finding as to agricultural labor. Contrary to the Service's position, there is nothing strange in concluding that the statute first defines temporary agricultural laborers as non-immigrants but then does not allow them to enter the United States when there is no shortage of domestic labor.

The application of Subsection (H) to commuters is confirmed by its legislative history. It was specifically designed to limit the entry of agricultural laborers. Both the Service and Department of Labor promised that, after the termination of the bracero program in 1964, Mexican farm laborers would have to enter the country as non-immigrants subject to the restrictions of Subsection (H). However, the Service has allowed, as its brief in this case admits, the continued entry of braceros as immigrants.

B. All seasonal commuters and those daily commuters who come to the United States only during the agricultural season should be reclassified by the Service as non-immigrants. It is clear that an alien's entry into this country must be legal each time he enters. Section 101(a)(20) specifically provides that an alien continues to be considered as lawfully admitted for permanent residence only as long as his status has not changed. Since commuters are not residents of this country, their status has changed and Subsection (H) applies.

III

The issue in this case should be resolved by the Court. While this case involves complex and important problems involving international relations, agricultural labor and the like, this Court need not and should not consider the policy issues suggested by the Service. Instead, the Court is simply called upon to exercise its customary responsibility to determine the meaning of a federal statute. The most persuasive indication of this meaning is of course the words of the statute itself.

ARGUMENT

I

COMMUTERS MUST HAVE AN IMMIGRANT VISA AND A LABOR CERTIFICATION FROM THE SECRETARY OF LABOR IN ORDER TO ENTER THE UNITED STATES

While we submit that most commuters are properly classifiable under the Immigration and Nationality Act as non-immigrants (see Part II, *infra*, pp. 73-90 below), the Immigration and Naturalization Service classifies them as immigrants. Stipulation, Gov. Pet. App. D, pp. 34-35. We assume in Part I of this brief that the Service is correct in classifying daily and seasonal commuters as immigrants. We contend that, on this assumption, plaintiffs were entitled to summary judgment on the first claim of their complaint because daily and seasonal commuters must have immigrant visas and labor certifications in order to enter the United States.

Immigrant aliens may not enter the United States without a valid immigrant visa (Section 211(a) of the Act, 8 U.S.C. 1181(a), unless they are "returning resident immigrants" (Section 211(b), 8 U.S.C. 1181(b)). An immigrant visa is issued for a period of four months and is surrendered upon entry. Section 221(c), (e), 8

U.S.C. 1201(c), (e). An immigrant visa may be obtained by an immigrant entering the United States to perform labor only if the Secretary of Labor has certified that there are not sufficient domestic workers to perform the labor and that his employment would not adversely affect the wages and working conditions of American domestic workers. Section 212(a)(14), 8 U.S.C. 1182(a)(14). Since the Secretary of Labor has determined that such a certification may not be made for agricultural labor (Schedule B, following 29 C.F.R. 60.6), commuters cannot obtain immigrant visas to enter the United States.

The Service has decided, however, that both daily and seasonal commuters come within Section 211 as "returning resident immigrants" and therefore do not need immigrant visas to enter the United States. Instead, the Service allows them to enter pursuant to Alien Registration Receipt Cards, commonly known as "green cards" (Form I-151). Stipulation, Gov. Pet. App. D, pp. 34-35. Since the Service requires no certification by the Secretary of Labor for commuters to continue to use green cards (Stipulation, Gov. Pet. App. D, p. 35), commuters continue to enter the United States to perform agricultural labor even though the Secretary has found that the entrance of immigrants to perform agricultural labor adversely affects the wages and working conditions of domestic workers. 29 C.F.R. 60.2(a)(2); Schedule B, following 29 C.F.R. 60.6.

A. Commuters Are Required To Obtain Immigrant Visas In Order To Enter The United States

1. *The Plain Language of the Immigration and Nationality Act and of the Regulations Require Commuters to Obtain Immigrant Visas*

As we have noted above, immigrant aliens may not enter the United States without valid immigrant visas,

unless they are "returning resident immigrants." Section 211(b) of the Act, 8 U.S.C. 1181(b). The Immigration and Nationality Act defines a returning resident immigrant as an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad." Section 101(a)(27)(B), 8 U.S.C. 1181(b). The regulations promulgated pursuant to and interpreting Sections 211 and 101(a)(27)(B) provide that an immigrant alien may enter the United States without an immigrant visa and pursuant to a green card only if he is "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad." 8 C.F.R. 211.1(b)(1). In order for the Immigration Service's practices to be sustained, they must be consistent with all these provisions of Federal statutes and regulations. In fact, we submit that the Service is violating each of them.

It is well established that statutes and regulations are to be interpreted according to their plain and ordinary meaning. *E.g., United States* v. *Temple*, 108 U.S. 97, 99 (1881); *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278, 280; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617-618 (1944). We submit that commuter aliens are clearly not "returning resident immigrants" of the United States; are not "lawfully admitted for permanent residence" or "returning from a temporary visit abroad"; and are not "returning to an unrelinquished lawful permanent residence in the United States."

a. *The Commuter Is Not a "returning resident immigrant" of the United States under Section 211(b) Because He Does Not Reside in This Country.* Section 211(b) allows immigrant aliens to enter the United States without immigrant visas if they are "returning resident immigrants." The Immigration and Nationality Act specifically defines "residence" to mean (Section 101(a)(33), 8 U.S.C. 101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that daily commuters have no "place of general abode" in the United States since they have no "dwelling place in fact" of any kind in this country. Those seasonal commuters, who have no permanent home in the United States which they retain when they are outside the country but have such a permanent home in Mexico, have their "principal, actual dwelling place in fact" in Mexico and are likewise not residents of the United States.

The Immigration Service does not contest that commuters reside in Mexico and not the United States. Both the Board of Immigration and Naturalization Appeals and Immigration Service define commuters as "persons who have their place of residence in foreign contiguous territory and commute daily to the United States to work." *In the Matter of L———*, 4 I. & N. 454, 455 (1951). Accord, *Matter of Flores-Maldonado*, 10 I. & N. 22 (1962); *Matter of Bustillos-Ruiz*, 10 I. & N. 60, 61-63 (1962); *Matter of Moore*, 13 I. & N. 711 (1971); Immigration and Naturalization Service, Operations Instructions, Section 211.3 (Nov. 28, 1973). In *Matter of Burciaga-Salcedo*, 11 I. & N. 665, 666 (1966), the Board of Immigration Appeals said that the Service treated "the commuter who obtained an immigrant visa as if he lived in the United States although he continued to live in the contiguous territory." Raymond F. Farrell, the Commissioner of the Immigration and Naturalization Service, told a subcommittee of the House Judiciary Committee only a year ago that the status of commuters is "really not that of a legal resident alien." Illegal Aliens, Hearings Before Subcommittee No. 1, House Judiciary Committee, 92nd Cong., 2d Sess. 1351 (1972). The General Counsel of the Service told the same subcommittee that

commuters "all obtained lawful admission for permanent residence, but they don't reside here." *Ibid.* The Service has defined a "seasonal worker or seasonal commuter" as "an alien lawfully admitted to the United States for permanent residence, who resides in a contiguous foreign country, who comes to the United States solely to perform seasonal work for extended periods * * *." Immigration and Naturalization Service, Responses to the Senate Subcommittee on Migratory Labor, p. 1-10, in Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2013 (1969).

Similarly, in *In Matter of C——— E———*, 7 I. & N. 599 (1957), the Board of Immigration Appeals determined that the residence of a Mexican national was in Mexico in a situation analogous to that of seasonal commuters. The alien frequently entered the United States both to work and visit relatives, sometimes for eight months at a time. The Board stated that the alien's stays in this country did not qualify as residence because he customarily lived in Mexico and, although he periodically came to the United States to work, his stays here were "temporary in nature." *Id.* at 600.

Moreover, commuters are not deemed to be residents of the United States for a variety of other purposes. Commuters, like other non-resident aliens, pay federal taxes only on income earned in the United States rather than on their total income. Staff Report of the United States Commission on Civil Rights, "The Commuter on the United States-Mexico Border," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 166-167 (1969). "[I]t has been held that a commuter cannot even become a citizen (the assumed purpose for

immigration under the Act) because, by definition, his assimilated status does not conform to the standard of residency (actual domicile in the United States) required by the Act for Naturalization." *Id.* at 166. See also pp. 89-90 below. Commuters cannot vote or hold office. S. Rep. No. 83, 91st Cong., 2d Sess. 63 (1969). A survey has shown that only 16.5 percent of commuters had served in the American armed forces in comparison to 94.4 percent who had served in the armed forces of Mexico. North, "The Border Crossers: People Who Live in Mexico and Work in the United States," prepared for the Manpower Administration, Department of Labor, pp. 205, 208 (April 1970).

The legislative history of Section 211(b) confirms that the phrase "returning resident immigrants" does not include daily or seasonal commuters. Prior to 1965, Section 211(b) included in the class of immigrants who could be admitted to the United States without an immigrant visa "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. In 1965, Section 211(b) was significantly narrowed by the adoption by Congress of its present wording of "returning resident immigrants." 8 U.S.C. 1181(b). This change supports plaintiffs' position that aliens must have visas unless they are actually residents of the United States and cannot merely have been admitted with the right to be residents.

The Committee Reports accompanying the 1965 amendments do not specifically discuss the reason for the change in the wording of Section 211(b). However, all of the 1965 amendments must be interpreted in the light of their stated purpose to provide (S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965); H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)):

> Safeguards to protect the American economy from job competition and from adverse working standards

as a consequence of immigrant workers entering the labor market.

The specific purpose of the amendment to Section 211 (b) becomes clear from the hearings conducted on "commuter workers" by the House Committee on Immigration and Naturalization prior to the 1965 amendments as part of a comprehensive study of population and immigration issues. Study of Population and Immigration Problems, Part II: The Mexican Farm Labor Problem [hereinafter Study of Population and Immigration Problems], House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11 (1963). The Committee questioned the legality of the commuter practice and its adverse impact on the American economy. *Id.* at 166. During the course of the hearings, the Immigration Service relied on the pre-1965 version of Section 211 of the Immigration and Nationality Act as the statutory basis for the commuter practice. L. Paul Winings, then General Counsel of the Service, insisted that it did not strain the language of Section 211(b) to call the commuter's absences from the United States "temporary departures," which under the then wording of Section 211(b) would have meant that no immigrant visa was required. *Id.* at 169. Walter Besterman, an authority on immigration law, who at the time of the 1963 hearings had been the Committee's legislative assistant for 17 years and who had been extremely influential in Congressional consideration of the 1952 Immigration Act, objected to this interpretation of the Act[7] (*id.* at 168-169):

> Is it your view of the very core of this problem that an immigrant who has not established permanent residence in the United States and is a commuter, in this class, is really complying with the law? Is his situation comparable to the status of the nonquota

[7] Besterman, as the record of the hearings demonstrates, was speaking on behalf of the Subcommittee. See *id.* at 166, 167.

> immigrant of the 101(a)(27)(B) class who is an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad?
>
> I am asking this question because you [Mr. Winings] mentioned earlier the situation of an immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family. That person would be, in my opinion, a returning immigrant when he comes back, regardless how often he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto.

Besterman ended the Committee's examination of the legality of the commuter practice by tersely stating, "I do not want to prolong that. I think the facts are before the Subcommittee." *Id.* at 169.

The Committee responded to the Immigration Service's statutory defense of the commuter practice by reporting a bill which replaced the phrase "aliens lawfully admitted for permanent residence who depart from the United States temporarily" with the phrase "returning resident immigrants." H.R. 2580, Sec. 9, in H. Rep. No. 745, 89th Cong., 1st Sess. 6 (1965). In 1965, Congress adopted this language in the Act. Under the new language, it was no longer enough that an alien had been admitted for permanent residence as all immigrants are. Instead, it was necessary for the alien actually to be a resident of the United States. Congress plainly intended by this amendment to prevent commuters from continuing to enter into the United States without meeting the requirements for obtaining immigrant visas whether or not they worked over six months in the United States.

The court below found that (Gov. Pet. App. A, p. 18):

> Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a

> foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work.

Since the Act defines residence as the "principal, actual dwelling place in fact, without regard to intent" (Section 101(a)(33), 8 U.S.C. 101(a)(33)), the court's findings should necessarily have led to the conclusion that neither daily nor seasonal commuters are "returning resident immigrants" under Section 211(b).

The court of appeals did conclude that "[t]he Service's practice [as to seasonal commuters] is in violation of the clear and plain language of the statute." Gov. Pet. App. A, p. 21. However, as to daily commuters, the court of appeals held (*id.* at 28):

> [T]he statutory language is not as plain and unambiguous as plaintiffs contend. Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. * * * Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

We submit that this reasoning could not be more totally inconsistent with the language of Section 101(a)(33), 8 U.S.C. 101(a)(33). A commuter's place of work

is obviously not "his principal, actual dwelling place in fact" as the Act requires. A commuter who has "a permanent commitment and interest" and "fraternal and cultural associations" in the United States does not have his "actual dwelling place in fact" in the United States as the Act requires. In relying upon the commuter's "commitment and interest" and associations the court below has plainly violated the Act's express language which states that residence must be decided "without regard to intent."[8]

Moreover, the court of appeals' position is inconsistent with the legislative history of Section 101(a)(33). The definition of residence received its present form in the Immigration and Nationality Act of 1952. 66 Stat. 120. Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." Section 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." The House Report accompanying H.R. 5678, which became the Immigration Act of 1952, stated that the definition of residence adopted by the 1952 Act was a codification of the construction of the term "residence" in *Savorgnan* v. *United States*, 338 U.S. 491 (1950). H. Rep. No. 1365, 82nd Cong., 2d Sess. 33 (1952).

The plaintiff in *Savorgnan* claimed that she had not lost her American citizenship because she had never in-

---

[8] We also emphasize that there is no evidence in the record that commuters individually or generally have such commitment or interest of fraternal or cultural associations in the United States. We doubt that these facts exist for the large majority of commuters who have their homes and spend most of their time not merely in a different city or state from where they work but in a different country with a different language and culture. As indicated above (p. 23), it is significant that most commuters had served in the armed forces of Mexico rather than the United States.

tended to establish a permanent residence outside of the United States. The plaintiff had taken an oath renouncing her American citizenship, sworn allegiance to Italy, and lived in Italy with her Italian husband throughout World War II without retaining any abode in the United States. This Court held that Mrs. Savorgnan's residence during this period had been in Italy with her husband since residence under the Nationality Act of 1940 was the person's principal dwelling place regardless of intent (338 U.S. at 505-506):

> Under the Act of 1940, the issue is not what her intent was on leaving the United States, nor whether at any later time, it was her intent to have a permanent residence abroad or to have a residence in the United States. The issue is only whether she did, at any time between July 1941, and November 1945, in fact "reside" abroad. The test of such "residence" is whether, at any time during that period, she did, in fact, have a "principal dwelling place" or "place of general abode" abroad. * * * Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material. She expatriated herself under the laws of the United States by her naturalization as an Italian citizen followed by her residence abroad.

Finally, it is obvious that the daily commuter has even less ties to the United States than the seasonal commuter. The daily commuter has no dwelling place, no matter how temporary, in the United States. He comes only for a few hours at a time simply for employment. In contrast, the seasonal commuter comes for a number of months and has a temporary dwelling place here. He is, if anything, more likely to develop interests and associations in this country. Since, however, under both the clear language of the Act and its legislative history, seasonal commuters are plainly not residents of the United States

under Section 211(b), daily commuters are *a fortiori* not residents of the United States under this provision.

The Service contends (Gov. Br. 30-31) that Section 211(b) does not require commuters to be "returning resident immigrants" at all in order to enter the United States without an immigrant visa because that Section states that "returning resident immigrants, defined in section 101(a)(27)(B)" may enter without a visa. The Service argues that since Section 101(a)(27)(B), 8 U.S.C. 1181(a)(27)(B), applies to "an immigrant, lawfully admitted for permanent residence, who is returning for a temporary visit abroad," the alien need but only be admitted for permanent residence and need not be a resident. We submit that the Service's interpretation would read the phrase "returning resident immigrants" entirely out of Section 211(b). If Congress intended the Service's interpretation, there can be no reason for having used the term "returning resident immigrants." Congress could have easily used the phrase "special immigrant" since Section 101(a)(27)(B) defines that term. Instead, Congress chose to provide that only "returning resident immigrants" could avoid the requirement of an immigrant visa.

Even if, however, the phrase "returning resident immigrants" is not an independent requirement which aliens must meet to come within Section 211(b), it is, at the very least, persuasive as to the meaning Congress intended in Section 101(a)(27)(B). We contend below (pp. 30-36) that Section 101(a)(27)(B) applies only to residents of the United States because the status of immigrants who do not become residents has changed and because non-residents are not returning from a temporary visit abroad when they seek to enter this country. Accepting *arguendo* the Service's position, Congress has stated in Section 211(b) that the phrase "returning resident immigrants" is defined in Section 101(a)(27)(B).

Therefore, in the absence of any indication to the contrary, Congress must be presumed to have intended the words of Section 101(a)(27)(B) to apply only to "resident immigrants." It would be strange indeed for Congress to define "returning resident immigrants" to include non-residents. We submit therefore that Section 211(b) shows that Congress, like the plaintiffs, considered the language of Section 101(a)(27)(B) essentially the equivalent of "returning resident immigrants" and therefore that Section 101(a)(27)(B) cannot be satisfied unless the alien is a resident of the United States.

b. *The Commuter Alien Is Not "lawfully admitted for permanent residence" or "returning from a temporary visit abroad" Under Section 101(a)(27)(B) When He Reenters the United States.* Commuter aliens should not be permitted to enter the United States without an immigrant visa because they are neither "lawfully admitted for permanent residence" nor "returning from a temporary visit abroad" as required by Section 101(a)(27)(B) of the Act, 8 U.S.C. 1101(a)(27)(B).[9]

First, Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), explicitly defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."[10]

---

[9] The *amicus curiae* brief of Bud Antle, Inc., argues that no distinction can be made between citizens and permanent resident aliens on the one hand and non-resident aliens on the other hand as to their rights to enter the United States. Such a contention would mean that 8 U.S.C. 1101(a)(27)(B) was unconstitutional. The *amicus* cites no cases even suggesting that Congress cannot provide for separate regulation concerning the entry of non-resident aliens into the United States. We submit that the constitutionality of such separate regulation is obvious.

[10] See pages 87-88 below for further analysis of the meaning of Section 101(a)(20).

However, the status of commuters has changed. While they were admitted for permanent residence, they either never assumed residence in the United States or subsequently abandoned that status. As we have described above (pp. 21-22), the Immigration Service concedes, that commuters are not residents.

Moreover, the Service's construction of Section 101(a)(20) makes no sense in the context of the statute. "Lawfully admitted for permanent residence" is defined in Section 101(a)(20) not only for purposes of Section 101(a)(27)(B) but for several other provisions of the statute. The Act provides that the Attorney General may grant a waiver of the Act's prohibition against entry of aliens who have been convicted of a crime or procured entry documents by fraud if the alien is the spouse, child or parent of a citizen or of an alien "lawfully admitted for permanent residence" (8 U.S.C. 1182(h), (i)); that an alien worker seeking to enter the country as a special immigrant must receive Department of Labor certification that there are not sufficient domestic workers to perform this labor and his employment would not adversely affect wages of American laborers, unless he is the parent, child or spouse of a citizen or of an alien "lawfully admitted for permanent residence" (8 U.S.C. 1182(a)(14)); a spouse or unmarried child of an alien "lawfully admitted for permanent residence" is entitled to a second preference visa (8 U.S.C. 1153(a)(2)); and a spouse, parent, or child of a citizen or of an alien "lawfully admitted for permanent residence" may not be deported because he procurred entry by fraud (8 U.S.C. 1251(f)). All these provisions are reasonable if an alien lawfully admitted for permanent residence means an alien who is actually a permanent resident of this country. But it is incredible to believe that those special privileges given to relatives of United States citizens or of permanent resident aliens were also intended to apply

to relatives of aliens who are residents of a foreign country and simply work in the United States.

Furthermore, two other sections of the Act strongly suggest that "lawfully admitted for permanent residence" does not include commuters. The Act provides for the admission of otherwise excludable aliens who are the spouse, parents or unmarried children of "a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa." 8 U.S.C. 1182(g). If the Service is right, that all aliens with immigrant visas are lawfully admitted for permanent residence, the last phrase is superfluous. Similarly, the Act provides that a border crossing identification card is to be issued to "an alien who is lawfully admitted for permanent residence or to an alien who is a resident in foreign contiguous territory." 8 U.S.C. 1101(a)(6). Again, this indicates that Congress distinguished between commuters who reside in foreign contiguous territory and aliens lawfully admitted for permanent residence. In short, as the court of appeals held, "the construction of 'lawfully admitted for permanent residence' as including commuters 'makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act, entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others.'" Gov. Pet. App. A, p. 21.

The Service's only response (Gov. Br. 28) to the incongruity—to say the least—of its interpretation of "lawfully admitted for permanent residence" when applied to other provisions of the Act is that these issues need not be resolved in this case. It then states that "[t]he interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections." *Ibid.* The Service is thus suggesting that the words "lawfully admitted for permanent residence" may have different meanings in different parts

of the Act. However, this phrase has been carefully defined by Congress in Section 101(a)(20) for purposes of the entire Act. Section 101(a) begins by specifically stating that "as used in this chapter," each of the phrases has the meaning set forth in that Section. Moreover, the House Report stated that this term has special significance because of its application to numerous provisions of the Act. H. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952). Consequently, this phrase must be interpreted in a manner which makes sense for all its applications.

Second, the phrase "returning from a temporary visit abroad" clearly means an absence from, and a subsequent return to, a more permanent place. Since the commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is not from the United States to Mexico but from Mexico to the United States. When the commuter returns to his permanent home in Mexico, he is hardly making a temporary visit abroad.

L. Paul Winings, then General Counsel of the Immigration and Naturalization Service, conceded in 1963 before the House Committee on Immigration and Naturalization that the ordinary meaning of "visit" in the phrase "temporary visit abroad" was an absence from a more permanent place. "One thinks of a visit as being, I presume, something away from a more permanent place." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 169 (1963). Winings claimed that the Service's approval of the commuter practice did not rely on Section 101(a)(27)(B) of the Act which referred to "a temporary visit abroad" but rather to the phrase in Section 211(b) referring to "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. That

Section, however, as we have seen (pp. 24-25 above), was changed by Congress to remove the very language upon which the Service relied and to refer to Section 101(a)(27)(B). In any event, by the Service's own admission, Section 101(a)(27)(B) provides no basis for allowing commuters to enter the United States without a visa.

Moreover, the phrase "returning from a temporary visit abroad" has been part of immigration law describing non-quota aliens since the first Immigration Control Act of 1921. Section 2(d), 42 Stat. 5, 6. It was incorporated in the Immigration Act of 1924 (Sec. 4(b), 43 Stat. 153) and in Section 101(a)(27)(B) of the present Immigration Act of 1952 using precisely the same language. The Secretary of Labor interpreted "temporary visit abroad" in the Immigration Rules of 1924 (Rule 9, Subdivision G):

> A "temporary visit abroad" as used in subdivision (d) of section 2 of said Act of May, 1921, as amended shall be construed to mean an absence in any foreign country *without relinquishment of domicile* for a period not exceeding six months. (emphasis added)

This interpretation of "temporary visit abroad" has been approved repeatedly by the federal courts. *Transatlantica Italiana* v. *Elting*, 66 F.2d 542, 545 (C.A. 2, 1933); *United States* v. *Day*, 21 F.2d 307, 308 (C.A. 2, 1927); *International Mercantile Marine Co.* v. *Elting*, 67 F.2d 886, 889 (C.A. 2, 1933); *Hurst* v. *Nagle*, 30 F.2d 346, 347 (C.A. 9, 1929), certiorari denied, 279 U.S. 861; *United States ex rel. Katric* v. *Reimer*, 25 F. Supp. 925, 926 (S.D. N.Y., 1938); *United States* v. *Parisi*, 24 F. Supp. 414, 417 (D. Md., 1938); *Serpico* v. *Trudell*, 46 F.2d 669, 670 (D. Vt. 1928) (alien retained "an actual home" in the United States which was "more than a retention of domicile)." For example, in *Transatlantica Italiana* v. *Elting*, *supra*, 66 F.2d at 545, Judge Learned

Hand stated that "[i]t is not clear as an original question that the phrase, 'returning from a temporary absence abroad,' implies that the alien must have acquired a domicile here, not relinquished during his absence. It is certainly possible to read the language as meaning no more than the alien had resided here, meant to come back when he left, and did not change his mind while absent." Thus, Judge Hand found that the language alone required domicile or at least residence in the United States. He then stated, based on the interpretation of the statutory language by the Secretary of Labor, that "the returning alien must have been domiciled and retained his domicile" in the United States. *Ibid.*

Similarly in *International Mercantile Marine Co.* v. *Elting*, two immigrant aliens who had previously been admitted for permanent residence to the United States and had resided in this country sought readmission as immigrants "returning from a temporary visit abroad." The court of appeals held that the aliens could not be readmitted to the United States as immigrant aliens returning from a temporary visit abroad because they did not have unrelinquished domiciles in this country (67 F.2d at 889):

> [T]hey were not temporary visitors abroad, but had relinquished their domicile in this country.
>
> They were clearly quota immigrants, although they had formerly resided in this country. They had given up their domiciles here and were not returning from a temporary visit abroad.

In the treatise on immigration law co-authored by the present general counsel of the Immigration Service, the authors, citing *International Mercantile Marine Co.* v. *Elting*, state that the legal criteria for whether an alien is "returning from a temporary absence abroad" is "whether the alien intended to abandon his residence in

the United States." 1 Gordon and Rosenfield, *Immigration Law and Procedure*, Sec. 2.19 (rev. ed., 1973).

Whether one accepts the judicial requirement of an "unrelinquished domicile" or Gordon and Rosenfield's "unrelinquished residence," neither the daily nor seasonal commuter is returning from a temporary visit abroad when he enters the United States. No commuter alien has a domicile in this country. "Domicile" means a man's permanent home to which, whenever he is absent, he has the intention of returning. *Matter of C——*, 1 I. & N. 631, 633-635, 640 (1943); *Matter of S——*, 1 I. & N. 646, 649 (1943); Kennan, Kossuth, and Kent, *A Treatise on Residence and Domicile*, p. 33 (1934). The presumption of the law is against a change of domicile. *Matter of C——*, *supra*, 1 I. & N. at 635. In order to effect such a change an individual must establish a residence in a new domicile and intend to remain there permanently. *Gilbert* v. *David*, 235 U.S. 561, 590 (1915); *Mitchell* v. *United States*, 88 U.S. 350, 353 (1874); *Matter of C——*, *supra*, 1 I. & N. at 635, note 8. Whether the commuter comes for daily or seasonal intervals, his domicile or home, just like his residence, remains in Mexico.

c. *The Commuter Alien Is Not "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" Under the Immigration Service's Own Regulations.* Prior to the Immigration and Nationality Act of 1952, the Service's regulations explicitly considered daily commuters as immigrants. Immigration Rules of January 1, 1930, Rule 3, Subdivision C, Para. 1. All mention of commuters, however, was eliminated after passage of the 1952 Act. Compare 17 Fed. Reg. 11483 (Dec. 19, 1952), with 8 C.F.R. 110.6 (1947 Supp.). This change at least implicitly supports our contention that the commuter practice is inconsistent with the Act.

Subsequently, the Immigration and Naturalization Service promulgated regulations pursuant to Sections 211 and 101(a)(27)(B) of the Immigration Act (8 U.S.C. 1181 and 1101(a)(27)(B)), which define those persons who are permitted to use Alien Registration Receipt Cards, usually called "green cards." This regulation provides (8 C.F.R. 211.1(b)(1)):

> In lieu of an immigrant visa, an immigrant alien returning to an *unrelinquished lawful permanent residence in the United States* after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *. [emphasis added]

This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" — was no mere inadvertance. It is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2.

The requirement of an unrelinquished lawful permanent residence in the United States first appeared in the regulation in 1957. 22 Fed. Reg. 6377. Previously, the regulation permitting entry without an immigrant visa stated (21 Fed. Reg. 832):

> Immigrants of the following described classes applying for admission to the United States need not present visas and passports:
>
> "(c) Aliens of the following described classes who have been lawfully admitted for permanent residence and who are returning after a temporary absence:
>
> "(1) An alien who is returning to the United States after a temporary absence of not more than six months, only in some point or place in North, Central or South America, or the places named in Section 101(b)(5) of the Act, and who present a form I-151 duly issued to him.
>
> (2) An alien who is returning from a temporary visit abroad and who presents a valid unexpired reentry permit.

Thus, the new regulation retained the earlier requirement that the alien was returning from "a temporary absence." However, the new regulation replaced the requirement that the alien be "lawfully admitted for permanent residence" with the much stronger and more explicit requirement that he have "an unrelinquished lawful permanent residence in the United States."

As we have seen (pp. 21-22), the Immigration Service has acknowledged that daily and seasonal commuters do not have residences in the United States. They even more plainly do not have "unrelinquished" and "permanent" residences in this country. Daily commuters do not have residences at all in the United States, let alone unrelinquished or permanent ones. Seasonal commuters plainly do not have unrelinquished and permanent residences since any residences they might have are abandoned when they return to their permanent residences in Mexico at the end of the agricultural season. Moreover, the requirement that the residence be unrelinquished makes clear that even commuters who originally were actual residents of the United States but who gave up these residences to become commuters can not use green cards to work in the United States.

The Service makes no serious effort (see Gov. Br. 35-36) to reconcile the language of 8 C.F.R. 211.1(b)(1) with its position. Instead, it states that "[w]hile the regulations could be more artfully drafted, the phrase 'unrelinquished lawful permanent residence' is meant to signify the unrelinquished *status* of an alien who has been granted the privilege of residing permanently in the United States" (emphasis in original). However, this tortured reading is directly inconsistent with the language. The regulation plainly requires unrelinquished *residence* and not unrelinquished status, which is precisely plaintiffs' construction of both the Act and the regulation.

Thus, neither daily nor seasonal commuters come within 8 C.F.R. 211.1(b)(1). As a result, commuters cannot use green cards to enter the United States for three distinct reasons.

First, the regulation, 8 C.F.R. 211.1, is an administrative interpretation of Section 211(b). Since this interpretation is consistent with the plain meaning of the statute it persuasively confirms this meaning.

Second, even if daily and seasonal commuters were "returning resident immigrants" under Section 211(b) and "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" under Section 101(a)(27)(B), commuters must still come within 8 C.F.R. 211.1 in order to enter the United States without an immigrant visa.

The Act allows aliens to enter the United States without immigrant visas only pursuant to regulations of the Attorney General. Section 211(a) of the Act, 8 U.S.C. 1181(a), requires, except as provided in Section 211(b), all immigrant aliens to have immigrant visas in order to enter the United States.[11] Section 211(b) makes an exception to Section 211(a) by stating that the Attorney General may admit "returning resident immigrants" without immigrant visas.

Part 211 of 8 C.F.R. is headed "Documentary Requirements: Immigrants; Waivers." Subsection (a) of 8 C.F.R. 211.1 requires that "a valid unexpired immigrant visa shall be presented by each arriving immigrant alien applying for admission to the United States for lawful permanent residence * * *." Subsection (b) then makes an exception for "an immigrant alien returning to an unrelinquished lawful permanent residence" to allow such an alien to use a Form I-151 in lieu of an immigrant visa.

[11] Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20), also makes immigrant aliens without immigrant visas excludable.

The Service has never pointed to any other regulation which would allow commuters to enter the United States without immigrant visas. Therefore, if commuter aliens do not come within 8 C.F.R. 211.1(b), they are prohibited by both the Act and the regulations from entering the United States without an immigrant visa.

Third, even if immigrant aliens are not required by statute to possess immigrant visas to enter the country, they can only use a green card if they comply with restrictions on its use. The Attorney General created the green card administratively in 8 C.F.R. 211.1(b) and he can restrict it. Indeed, Section 211(b) specifically provides that when the Attorney General does allow "returning resident immigrants" to enter without immigrant visas, he shall do so "under such conditions as may be by regulations prescribed." Here, the conditions clearly prohibit the use of green cards by commuters. This Court has held that "a regulation * * * should not be disregarded or annulled unless * * * it is plainly and palpably inconsistent with law" (*Boske* v. *Coningore*, 177 U.S. 459, 470 (1900)) and that valid regulations are binding upon federal agencies unless and until they are changed (*Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 540 (1959)). We therefore submit that commuters cannot use green cards in direct violation of the applicable and enforceable regulations.

2. *The Admission of Commuters Without Visas Cannot Be Justified on the Ground of Administrative Practice or Congressional Reenactment*

a. *Administrative Practice and Congressional Reenactment Cannot Be Used to Contradict the Clear and Unambiguous Language of the Act.* The Service's principal argument (Gov. Br. 39-63) is that the commuter system has gained legitimacy through administrative practice and Congressional reenactment. A contemporaneous

construction of an ambiguous or doubtful statutory provision by an administrative agency is of course entitled to weight. *Sanford's Estate* v. *Commissioner*, 308 U.S. 39, 52 (1939); *Houghton* v. *Payne*, 194 U.S. 88, 100 (1904). But an administrative practice, however long continued and consistently applied by successive administrative officers, must yield to the language of the statute. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1924); *Houghton* v. *Payne*, *supra*, 194 U.S. at 99-100; *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740, 759 (1931); *Koshland* v. *Helvering*, 298 U.S. 444, 447 (1936). "[T]he courts are the final authorities on issues of statutory construction * * * and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 211, 272 (1968). In other words, if the administrative construction of the statute is erroneous, it is, of course, not controlling. *Houghton* v. *Payne*, *supra*, 194 U.S. at 100.

Similarly, "where the law is plain, the subsequent reenactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938). See also, *e.g.*, *Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227, 237 (1873); *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 280 (1929); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740, 757, 759 (1931). As this Court held in *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118, 141 (1941), "[t]here is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words."

In short, as the Supreme Court has repeatedly held, the plain meaning of a statute is controlling. "That a

law is the best exposition of itself * * * [is] among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." *Pennington* v. *Coxe*, 6 U.S. (2 Cranch) 34, 52-53 (1804). See also, *e.g.*, *United States* v. *Missouri Pacific R.R. Co.*, *supra*, 278 U.S. at 278; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935). Where the words are clear and unambiguous, no other sources for judicial interpretation are necessary or appropriate.

As we have seen (pp. 20-36), the Service's practice of admitting commuters with green cards is clearly inconsistent with the language of at least two provisions of the Immigration Act. Indeed, it is not an attempt to construe statutory provisions at all but is admittedly an administrative invention. See pp. 45-47 below. Instead of being a construction of a statute, it was designed to avoid statutory restrictions because of the Service's belief that they were inappropriate.

Furthermore, even if some doubt existed concerning Sections 211(b) and 101(a)(27)(B), this doubt must be resolved in the light of their purpose. It is a well-established rule that, when a statutory provision requires interpretation, it should be interpreted in the light of its purpose (*Gayle* v. *Wilder*, 51 U.S. 477, 496 (1850)):

> It is not by detached words and phrases that a statute ought to be expounded. The whole act must be taken together, and a fair interpretation given to it, neither extending nor restricting it beyond the legitimate import of its language and its obvious policy and object.

See also, e.g., *Helvering* v. *N.Y. Trust Co.*, 292 U.S. 455, 464-465 (1934); *Richards* v. *United States*, 369 U.S. 1, 11 (1962).

One of the principal purposes and objects of the Immigration and Nationality Act of 1952 and its 1965

amendments, like all earlier immigration acts, was to protect American labor. The Supreme Court in *Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231, 243, 244 (1929), emphasized the long existing Congressional policy of protecting American labor through the immigration laws:

> The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points out clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. * * * The report of the House Committee to accompany the bill which afterwards became the Act of 1924, now under consideration (H. of R. Report 350, 68th Cong., 1st Sess.) likewise makes clear that protection of American labor was one of the controlling reasons for further restriction of immigration.

Congress was particularly concerned about aliens who were coming to the United States not to take up residence but to exploit the country's labor opportunities at the expense of domestic American workers (*id.* at 244):

> In the Senate report upon the same bill (S. Report 17, 67th Cong., 1st Sess. p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment.

The steps taken in the last two decades to control immigration have shown an even stronger purpose to protect American labor. The Immigration and Nationality Act of 1952 and the 1965 amendments reaffirmed the earlier Congressional policy:

> "While the bill [the Immigration and Nationality Act of 1952] will remove the 'contract labor clauses' from the law, it provides strong safeguards for

American labor." H. Rep. No. 1365, 82d Cong., 2d Sess. 50 (1952).

"Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened." S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965).

Consequently, Congress in Sections 101(a)(15)(H) and 212(a)(14), 8 U.S.C. 1101(a)(15)(H) and 8 U.S.C. 1182(a)(14), added new provisions to give this protection. These sections allow non-immigrants and immigrants, respectively, to enter the United States only if there is no surplus of domestic labor in their categories of employment. These provisions on their face have as their purpose the protection of American labor. As the court stated in *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 119 (D. D.C., 1969), Section 212(a)(14), "with § 101(a)(15)(H), was newly designed by the 1952 act in order to assure 'strong safeguards for American labor.'" And the recent quota on immigration from the Western Hemisphere provided in the 1965 amendments and implemented in 1968 (Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921) further evidences the Congressional awareness and concern over the influx of laborers from Mexico and other Western Hemisphere nations.

Both the language and purpose of the Immigration and Nationality Act are consistent in attempting to protect American labor from commuter aliens who pose a serious economic threat. In light of this strong and clear policy of protecting American laborers from competition with foreign workers through the immigration laws, there is no basis for a strained interpretation of the Immigration and Nationality Act to allow foreign nationals to enter the country to work.

b. *The Service's Alleged Administrative Practice Has Admittedly Been Invented Without Support in Applicable Federal Statutes.* As we have seen (pp. 21-22 above), the Immigration Service admits that commuters are not residents of the United States. Moreover, officials of the Service have been frank in admitting that the commuter practice was an administrative invention. Charles Gordon, the present General Counsel of the Immigration Service and co-author of an authoritative text on immigration law, calls the commuter status "a device of convenience," "never specifically * * * authorized by statute." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 181-182 (1969). Mr. Gordon uses the phrase "amiable fiction" to describe the anomalous situation of the commuter. *Id.* at 181, 186; Immigration and Naturalization Service Regional Office Operations, Part 1, Hearings before a Subcommittee of the House Government Operations Committee, 93rd Cong., 1st Sess. 95 (1973).[12]

Similarly, Gordon and Rosenfield in their treatise on immigration law state (1 *Immigration Law and Procedure*, Sec. 2.86 (rev. ed. 1973):

> Where this employment (of Mexicans and Canadians) is permanent in character administrative ingenuity has devised a "commuter" status, which enables the Canadian or Mexican to obtain lawful admission for permanent residence in order that he may be able to pursue his employment here, and his right to enter each day is attested by his alien registration receipt card. Of course, this device is an amiable fiction, since the commuter is coming temporarily

[12] The hearings use the phrase "amiable fixation" which is undoubtedly a typographical error.

> and usually returns to his home in Canada or Mexico each night.

Subsequently, in their 1973 supplement (Sec. 2.19), the authors again admit that since commuters "reside in adjacent countries," "the practice does not fit precisely within the statutory pattern * * * [and] does involve some logical inconsistency."

The Board of Immigration Appeals has likewise stated that (*Matter of M—— D—— S——*, 8 I. & N. 209 (1958)):

> The commuter situation manifestly does not fit into any precise category found in the immigration statutes. The status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors.

In *Matter of H—— O——*, 5 I. & N. 716, 719, note 13 (1954), the Board referred to "the fiction of a commuter's permanent residence coinciding with his place of employment * * *." In *Matter of Hoffman-Arvayo*, 13 I. & N. 750, 752, note 2 (1971), the Board said that commuters could use green cards to enter the United States "based upon the fiction that their presence in the United States while employed amounts to permanent residence in the United States." Accord, *Matter of L——*, 8 I. & N. 643, 646 (1960); *Matter of J—— P——*, 9 I. & N. 591, 593-594 (1962); *Matter of Burciaga-Salcedo*, 11 I. & N. 665, 667 (1966); *Matter of Gerhard*, 12 I. & N. 556, 557 (1967). And in *Cermeno-Cerna* v. *Farrell*, 291 F. Supp. 521, 529 (N.D. Cal., 1968), the court reiterated that the commuter status was a "fiction" which has "no statutory or constitutional status."

In short, the Immigration and Naturalization Service freely admits that the commuter practice was not authorized by any statute but was simply invented and continued to meet a need which the Service believes exists. The Service's lengthy brief significantly omits even any

mention of these admissions that the statute itself does not authorize the commuter practice.

c. *The Commuter Practice Is Not Supported by Long, Clear, and Consistent Administrative Practice.* Even if the language of the statute were less plain and required interpretation, and even if the administrative practice were solidly based on the wording of the statute, the administrative practice here gives little support to the Service's position. An administrative practice is entitled to weigh in construing an ambiguous statute only if it is consistent, clear, and of long duration. *Iselin* v. *United States*, 270 U.S. 245, 251 (1945); *Helvering* v. *Hallock*, 309 U.S. 106, 120, note 7 (1941); *United States* v. *Missouri Pacific R. Co.*, *supra*, 278 U.S. at 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16, 20-21 (1932). The commuter system does not meet these criteria.

(i) The commuter system is, as we have seen (pp. 36-40), directly inconsistent with the Service's own regulations. 8 C.F.R. 211.1(b)(1). Such regulations constitute the highest administrative authority. They are published in the Federal Register. Section 211.1(b)(1) constitutes the Service's reasoned judgment as to the meaning of Section 211(b) of the Immigration and Nationality Act which specifically authorizes the Service to promulgate regulations providing conditions for the entrance of immigrants without immigrant visas. These regulations are legally binding until changed. *Service* v. *Dulles*, *supra*, 354 U.S. at 388; *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 539-540. The fact that these regulations have not been enforced merely demonstrates that the Service has illegally refused to follow its own regulations as well as the applicable statutes.

(ii) The commuter practice is not of long duration in any meaningful sense. As the court below outlined (Gov. Pet. App. A, pp. 24-26), while the daily commuter practices began in the 1920s (see Appendix B, pp. 98-102 be-

low), prior to the adoption of the Immigration and Nationality Act of 1952, the practice was of little substantive significance. Since there was no quota on Mexican nationals and no prohibition against immigrants or nonimmigrants coming to the country because of a surplus of domestic labor in their field of employment, Mexican nationals were entitled to enter the country as immigrants virtually without restriction. However, if daily commuters had been required to obtain a new document for every entry into the country, this would have imposed a heavy burden on both the immigrant and the Service. The commuters could presumably have obtained such a document if he went to the trouble of applying for one for every working day and the Service went to the trouble of processing every application. Consequently, the commuter practice was actually only an invention to meet a severe administrative problem.

L. Paul Winings, then General Counsel of the Service, has described how the Service "devised" the status (Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 178 (1963)):

> In studying the problem at that time [after the passage of the Immigration Act of 1924] the immigration authorities concluded that Congress had not intended to interfere with the established pattern of regular border crossing by workers from adjacent countries who commuted to jobs in the United States. Such aliens, almost without exception, could obtain immigrant visas without difficulty. But they would be faced with an impossible task if they were required to obtain a new visa for each daily reentry. Therefore, the immigration authorities devised a border-crossing identification card which could be obtained by aliens who frequently crossed the international boundary.

In short, prior to 1952, the daily commuter practice did not give the commuter any substantive rights to enter which he did not have under immigration law.

In sharp contrast, the continuation of the daily commuter system after 1952 for the first time directly undermined substantive protections designed by Congress to protect American labor. In 1952, Congress provided that immigrants could not enter the United States if the Secretary of Labor found that an economic threat to American labor would result. 66 Stat. 183. In 1965, Congress strengthened this provision to forbid immigrants to enter the United States unless the Secretary of Labor determined that no threat existed. Section 212 (a) (14) of the Act, 8 U.S.C. 1182(a) (14). And in 1968 a quota was for the first time imposed on immigrants from Mexico. Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921.

The commuter system undermines those protections. It allows Mexican aliens to continue to enter the United States indefinitely even though they constitute an economic threat to American labor. They can continue to come although Congress has imposed a quota to limit entry of Mexican and other Western Hemisphere nationals.

While the daily commuter system started in 1924 and became legally significant in 1952, the Service has admitted that the seasonal commuter system did not even begin until after the end of the bracero program in 1964. The bracero program, which had been begun in 1943, allowed Mexican nationals to enter the United States to work during the agricultural season. The bracero program, as it existed on the eve of its termination in 1964, had many safeguards to protect American labor. The Secretary of Labor determined wages and set standards for working and living conditions under which the bracero would be employed. In addition, no Mexican farm-

workers could be brought into the United States until the Secretary of Labor had determined and certified that (*Report of the Select Commission on Western Hemisphere Immigration*, p. 92 (1968):

> (1) Sufficient domestic workers, able, willing and qualified, were not available at the time and place needed to perform the work for which such braceros were to be employed;
>
> (2) The employment of such workers would not adversely affect the wages and working conditions of domestic workers similarly employed; and
>
> (3) That reasonable effort had been made to attract domestic workers for such employment at wages and conditions comparable to those offered to braceros.

Despite the protective features of the bracero program, there was a growing concern in the country over the adverse impact of the bracero program on domestic labor. See Statement of President Kennedy signing the final extension of the bracero program in 1961 in Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, 41 (1963); Report of the Secretary of Labor, "Year of Transition, Seasonal Farm Labor—1965," pp. 1-2, Appendix H-1, H-2 (1965). As a result, Congress refused after 1964 to allow the program to continue. It intended, as we will see below (pp. 79-81), to protect American labor from low-priced foreign competition and to require that the future entry of Mexican nationals for farm work be governed by the provisions applying to nonimmigrants under Section 101(a)(15)(H)(ii).

When farmers in the southwestern United States saw that the end of the bracero program was near, they obtained immigrant visas for many of their Mexican workers. Thus, when the bracero program came to an end in 1964, many ex-braceros, now nominally permanent resi-

dent aliens, started entering the country as seasonal commuters in the spring, following the crops through various parts of the country and returning to their permanent residences in Mexico at the end of the harvest season. Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues" in *Report of Select Commission on Western Hemisphere Immigration*, p. 104 (1968); Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 73 (1969).

In order to allow the ex-braceros to enter the country, the Immigration Service, as it has unabashedly admitted, created a new class of commuters after 1964 to allow them to enter as seasonal workers. James S. Hennessy, the executive assistant to the Commissioner of the Service, testified before a House committee in 1969 (*id.* at 70, 73):

> A new class has come into being whom I would call the seasonal worker, a person who comes into the United States, for instance, at the opening of a growing season, has moved north as the crops mature; and at the end of the growing season, he has returned to Mexico.
>
> * * * *
>
> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

More recently in response to written interrogatories posed by the Senate Subcommittee on Migratory Labor, the Service described the seasonal commuter as follows (Immigration and Naturalization Service, Responses to the Senate Subcommittee on Migratory Labor, pp. 1-10, in Hearings on Migrant and Seasonal Farmworker Power-

lessness; Part V: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2022 (1969)):

> The seasonal worker or seasonal commuter is a relatively new concept under the immigration laws. It developed after the end of the bracero program in 1964 * * *.

In creating this new class, the Immigration Service had to flagrantly ignore Section 101(a)(15)(H) which was designed to provide non-immigrant status for aliens entering the country for temporary employment. See pp. 74-76 below.

In addition, the Service had to change one of its standards concerning commuters to accommodate the new seasonal commuter. Prior to 1965, it had been the position of the Immigration Service that "an alien is entitled to commuter status only if he has a permanent and stable job in this country." Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues," in *Report of the Select Commission on Western Hemisphere Immigration*, pp. 103, 105 (1968); *Matter of L——*, 8 I. & N. 643 (1960). The Immigration Service has stated that ("Commuters—Historical Background, Legal Challenges and Issues," *supra*, p. 105):

> It had been the position of the Service that a commuter must engage in employment which is "permanent and stable" in order to maintain his status. If that test were applied to the employment of the above workers [seasonal commuters], many would lose their status.

However, in 1965, the Immigration Board of Appeals changed the requirement to "regular and stable" employment and interpreted that phrase loosely to allow the entrance of seasonal commuters. *Ibid.; Matter of Bailey,*

11 I. & N. 466 (1965). Thus, as the court below concluded (Gov. Pet. App. A, p. 30):

> As to the post-1964 practice of the Service in regard to seasonal commuters, it is only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

The Service objects (Gov. Br. 70-74) to the determination of the court of appeals that the Service created a new class of commuters in 1964 to replace the bracero program. However, the Service's own detailed history of the end of the bracero program supports the basic conclusion of the court below that the large majority of seasonal commuters were formerly braceros who converted to commuter status in the early 1960's. Indeed, the Service's history goes further and shows (Gov. Br. 71-72) that this conversion in status was done pursuant to the encouragement of their employers who decided to protect their supply of labor at a time when the bracero program was being terminated because of its abuses. In any event, whether the seasonal commuter program originated in 1964 or 1960, it is undisputed that it is of recent origin. There can therefore be no contention that it is supported by a long and consistent administrative practice.

As a result of the Immigration Service's broadening of the commuter concept, the commuter is no longer a threat simply to our border communities. The daily commuter can work only within a few hours automobile drive of the border. The seasonal commuter has now entered the migrant stream in areas far inland in competition with one of this country's most depressed and economically deprived work force.

(iii) Finally, the statutes involved in this case are not the sole responsibility of the Department of Justice and the Immigration and Naturalization Service. As we have seen, the immigration laws have as a primary purpose the protection of American labor, a responsibility of the Department of Labor. The Secretary of Labor, not the Department of Justice, was explicitly given the authority by Congress to determine whether immigrant aliens would be prohibited from entry because they would compete for jobs with domestic workers. Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14).[13] It is therefore fair to consider the position of both the Department of Labor and Department of Justice in construing a statute so integrally related to the work of both departments.

The Department of Labor has strongly condemned the commuter practice. Former Secretary of Labor Willard Wirtz and other high-ranking members of the Department testified before Congressional committees that the commuter practice contradicts the language and the intent of immigration law. Hearings on Migrant and Seasonal Farmworker Powerlessness, Part 5, *supra*, pp. 2529-2548; Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 12, 20, 24, 33, 34 (1967). As Secretary Wirtz described the commuter practice (*id.* at 12):

> We are talking about a problem that exists only because it is covered by such a bramblebush of confusion and lack of understanding that the country does not know about [it]. We are talking about a situation that could best be described, if word would go out from this hearing session that someone has

[13] Similarly, the Service's regulations provide that the Secretary of Labor must certify whether non-immigrants temporarily entering the United States for purposes of employment under Section 101(a)(15)(H) of the Act, 8 U.S.C. 1101(a)(15)(H), will compete with American labor. 8 C.F.R. 214.2(h)(2)(ii).

> the courage to say: "You have a cancer on your arm. You had better cut it out before it gets worse." We are talking about a situation which affects that drastically the living conditions of millions of people in this country.

Thus, it is clear that the executive branch seen as a whole, has not consistently upheld the commuter practice.

d. *Congress Has Never Ratified The Commuter Practice.* This Court has generally looked with disfavor upon the proposition that reenactment of a statute constitutes a legislative adoption of its administrative construction. *Commissioner* v. *Glenshaw Glass*, 348 U.S. 426, 431 (1955); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1941); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1940). The Court has said of the reenactment theory (*Helvering* v. *Hallock*, *supra*, 309 U.S. at 119-120, 121):

> To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.
>
> * * *
>
> Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

The reasons for the Court's reluctance to accept reenactment as Congressional approval of an administrative practice have been ably set forth in Hart and Sachs' authoritative treatise on *The Legal Process: Basic Problems in the Making and Application of Law* (1958). In a chapter on "The Implication of Reenactment," the authors conclude that since the legislature is not under a duty to act in every case where a question affecting the public policy has been acted upon by an administrative agency, it is not rational to attach any significance to its

failure to act in a given case. *Id.* at 1395. They state that the reenactment theory is especially inappropriate in the situation of a revision and codification of an entire branch of statutory law. Such an enterprise is a necessarily technical chore having little political appeal. In order to be successful, it must be a bipartisan effort free from controversy. Acceptance of the reenactment theory would force the legislature to either of two equally untenable alternatives—either to do nothing, leaving the area of law in confusion, or to act decisively on each area of controversy which has arisen under the various statutes. *Id.* at 1402-1404.

Hart and Sachs use the Nationality Act of 1940 as their example of the unreasonableness of the reenactment theory in the codification of an area of law. *Id.* at 1402-1403. Thus, they use the very area of law involved in this case. The 1940 Nationality Act, of course, was in turn recodified in the much more comprehensive and, correspondingly, more intricate Immigration and Nationality Act of 1952.

It is therefore appropriate to scrutinize the Service's reenactment theory with great care as to whether Congress has in fact intended to approve the Service's administrative practice. We submit that such scrutiny will show that the Service's contention based on tacit approval is erroneous for at least four reasons.

First, as we have seen (p. 41), tacit Congressional approval of administrative or judicial interpretation based on reenactment of a statute cannot change the meaning of a clear federal statute. In other words, when the administrative construction is erroneous, as in the present case, reenactment of the statute can not give it validity.

Second, reenactment of a federal statute can only constitute Congressional approval of a practice which has been clear, consistent, and long confirmed. *Iselin* v.

United States, 270 U.S. 245, 251 (1945); *United States* v. *Missouri Pacific R. Co.*, *supra*, 278 U.S. at 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16, 20-21 (1932); *Helvering* v. *Hallock*, *supra*, 309 U.S. at 120. As we have seen (pp. 47-53), the Service's administration of this statute has not been clear, consistent or long-standing.

Third, the Service's administrative practice did not exist when the statutes in question were enacted. The seasonal commuter practice began in 1964 (or at least in the 1960's) and Congress believed that seasonal agricultural workers would be covered under Section 101(a)(15)(H)(ii) of existing law. See pp. 49-52 above and 79-81 below. Since no major immigration statute has been enacted subsequent to 1965 when the Service ignored both the statute and Congress' purpose, Congress could not possibly have acquiesced in the Service's illegal actions.

While the daily commuter procedure began in the 1920s, it had no important substantive effect until after adoption of the 1952 Act. As we have seen (pp. 24-25, 33-34), Congress, in the 1965 amendments, the only important immigration legislation adopted since 1952, far from approving the commuter practice, indicated its disapproval and its intention to end it.

Fourth, as the court below found (Gov. Pet. App. A, p. 26), there is no indication in the history of any immigration law that Congress intended to approve the commuter practice. The Service is therefore forced to rely on the alleged existence of its practice, Congressional knowledge of it, and the fact that Congress passed general immigration legislation. Congressional action in passing immigration legislation, without any suggestion of approval of the commuter practice, is hardly entitled to significant weight.

The Service notes (Gov. Br. 47-51) that several attempts were made prior to 1952 in Congress, including

in the Alien Registration Act of 1940, 54 Stat. 670, to end the commuter system. As we have seen, however, until 1952, the commuter system was essentially an administrative convenience and did not undermine protection for American labor because both Mexican and Canadians could readily obtain immigrant visas. Therefore, the determination of Congress not to end the system at that time has no relevance to whether Congress intended the system to be used after 1952 to undermine new and important restrictions on the entry of foreign workers.

The Service points (Gov. Br. 52-54) to references to the commuter program in the Senate Report accompanying the Immigration Act of 1952 as an endorsement for the program. S. Rep. No. 1515, 81st Cong., 2d Sess. 535-536, 616 (1950), describes the commuter practice as part of a lengthy report of some 925 pages prepared early in 1950 covering the immigration system of the United States as it existed prior to the enactment of the Immigration Act of 1952. The references to the commuter practice consist of brief descriptions of current immigration practices as they existed at that time. They neither approved nor disapproved the practice.

Congress not only did not register approval for the commuter practice in the legislative history accompanying the Immigration and Nationality Act of 1952 but in fact tightened the language of provisions which the Service had cited to support the practice and added new provisions to immigration law further to protect domestic labor.

For example, prior to the 1952 Act, the term "nonquota immigrant" was defined as an "immigrant who is returning from a temporary visit abroad." Immigration Act of 1924, Sec. 4(b), 43 Stat. 155. The 1952 Act tightened the definition by adding the phrase "lawfully admitted for permanent residence." Section 101(a)(27)(B), 8 U.S.C. 1101(a)(27)(B). Similarly, Section 13(b)

of the 1924 Act provided that an immigrant who had "been legally admitted to the United States and who departed therefrom temporarily" might be admitted without an immigration visa. 43 Stat. 161. Section 211(b) of the 1952 Act added "lawfully admitted for permanent residence." 66 Stat. 181. These definitions relate directly to the commuter issue since it is Section 211(b) which authorizes the admission of immigrants without immigrant visas and that Section defines the eligible immigrants as those coming within the Act's definition of non-quota immigrants.[14]

Several new provisions were added by the Immigration and Nationality Act of 1952 which are also pertinent to the commuter situation. For the first time, the concept of "residence" was defined to mean "the place of general abode" which in turn is defined as the "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33), 8 U.S.C. 1101(a)(33). As we described (pp. 20-22), commuters do not have a residence in the United States under the Act's new definition of residence.

The 1952 Act also added in Section 212(a)(14) a labor certification provision to exclude immigrants who would economically harm American workers. 66 Stat. 183. If the Secretary of Labor determined that such immigrants would work in employment having a surplus of domestic labor or would adversely affect wages or working conditions of domestic labor, they could not obtain immigrant visas to enter the country. This new provision, particularly as strengthened by the 1965 amendments (see p. 67 below), offers additional protection for domestic labor. This protection is significantly undermined by continuance of the commuter system because

---

[14] After the 1965 amendments, these eligible immigrants were labeled as "speical immigrants." Section 101(a)(27)(B), 8 U.S.C. 1101(a)(27)(B).

the Service permits commuters to enter pursuant to green cards without a labor certification.

Finally, the 1952 Act added two provisions to immigration law which principally relate to plaintiffs' claim that commuters are properly non-immigrants. See pp. 73-90 below. One, Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), defined "lawfully admitted for permanent residence" to state specifically that an alien continues to come within this category only as long as his status has not changed. The other, Section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii), adds a new non-immigrant category for persons coming temporarily to work in the United States. This section allows such temporary workers to enter only "if unemployed persons capable of performing such service or labor cannot be found in this country." As we show below, all seasonal commuters and those daily commuters who work only part of the year in the United States are properly non-immigrant aliens under Section 101(a)(15)(H)(ii) and cannot enter since there is a surplus of farm labor.

The 1965 amendments to the Immigration and Nationality Act further reflect Congressional dissatisfaction with the commuter practice. As we have seen (pp. 24-25, 33-34), the Committee staff challenged the legality of the practice and expressed serious concern over its impact on domestic labor at the hearings before the House Judiciary Committee preceding passage of the 1965 Act. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, pp. 166-169 (1963). As we have further shown, Congress' rewording of Section 211(b) to allow waiver of the visa requirement only in the case of "returning resident immigrants" removed the statutory basis for the use of green cards by commuters.

Moreover, the commuter program has been repeatedly examined and denounced before and by the Congressional

committees responsible for immigration matters. In 1963 the House Committee on Immigration and Naturalization conducted hearings on "Commuter Workers" as part of a larger *Study of Population and Immigration Problems*; the Senate Sub-Committee on Immigration and Naturalization conducted hearings on the *Alien Commuter "Green Card" System* in 1967; the Select Commission on Western Hemisphere Immigration held five sets of hearings on *The Impact of Commuter Aliens Along the Mexican and Canadian Borders* in 1968; the House Special Subcommittee on Labor of the Committee on Education and Labor held hearings in 1969 on the *Employment of "Green Card" Aliens during Labor Disputes*; and the Senate Subcommittee on Migratory Labor held hearings on *Migrant and Seasonal Farmworker Powerlessness; Part 5: The Border Commuter Labor Problem* in 1969. The unanimous reaction of these Congressional committees has been incredulity at the twisted interpretation which the Immigration Service has given immigration law in order to permit the commuter practice and indignation that the Service has ignored a Congressional mandate to protect American labor.

During these studies of the commuter problem, many Congressional leaders clearly stated that the practice violated the letter and intent of the immigration law:

> "Senator Kennedy [floor manager for the 1965 Immigration Amendments]: First, the system is a creature of administrative ingenuity, without statutory base, and for more than 40 years has operated rather freely outside the Immigration laws. Problems have inevitably emerged. Adequate determinations have not been made, for example, as to whether or not aliens who reside outside the United States, but who regularly commute to places of employment within our country, are entitled to hold green cards and permanent resident status as regular bona fide immigrants. I feel there is reason to believe that such

a practice is an abuse of the intent and purpose of the Immigration and Nationality Act. Green cards are not permanent re-entry permits." [Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 2 (1967)]

"Senator Yarborough [Chairman, Senate Committee on Labor and Public Welfare]: It seems to me that when you issue the green card, the way it works is, in effect, saying: Well, the man who holds a green card, this represents an executive suspension of the immigration laws of Congress, because you say in your statement that he is a resident alien, the fact that he works in this country he qualifies as a resident alien but is not required to be a resident here.

"Secretary Wirtz. That does not make sense.

"Senator Yarborough. No. You say he is a resident alien when he is not a resident alien. He is a resident of the other nation, travels back and forth across the bridge every day and you give him a special status. This is just a suspension. This green card is something outside the law, it seems to me." [*Id.* at 33-34]

"Senator Kennedy: Now, it seems to me that the question about these fellows going back [commuters returning to the United States] by your admission and by Judge Youngdahl's description in the court [*Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 119, note 6 (D.D.C., 1960)] that this is fiction. I hope that you are not relying on that." [*Id.* at 56]

* * * *

"Senator Kennedy: * * * But even using that definition of the permanent resident [Section 101(a)(27)(B)], I do not see how you could possibly say that these individuals who do reside in Mexico could fulfill that requirement. It says, are residing permanently in the United States, they are not residing permanently in the United States.

"Mr. Gordon [General Counsel of the Immigration and Naturalization Service]: Lawfully admitted for permanent residence.

"Senator Kennedy: But they are not residing.

"Mr. Gordon: That is true, they are given the privilege of establishing residence." [*Id.* at 62-63]

"Senator Yarborough: It is an administrative practice [commuter practice] that grew up outside of the law. There is no legal basis for the issuance of the green card. There is no law provided for the issuance of the green cards. The green card system operates rather freely outside of the immigration law." [Hearings on the Impact of Commuter Aliens Along the Mexican and Canadian Borders before the Select Commission on Western Hemisphere Immigration, Part I, p. 211 (1968)]

"Senator Yarborough: I want to emphasize that what he [Mr. Guerra, a witness] says, that this is correct, that there is no statutory authority whatsoever, that they just administratively decided to do this." [Hearings on Migrant and Seasonal Farmworker Powerlessness; Part V: Border Commuter Labor Problems before Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2577 (1969)]

Congressman Feighan, the Chairman of the House Subcommittee on Immigration and Nationality, stated on the floor of the House (115 Cong. Rec. 7752-7753 (1967)):

> This system—a creature of administrative ingenuity without a statutory base—permits Canadian and Mexican workers who have been lawfully admitted to the United States for permanent residence, and who hold alien registration receipt cards, commonly known as "green cards," to reside in Canada or Mexico and regularly commute across the border to places of employment in the United States.

Senator Kennedy, the floor manager of the 1965 amendments, has stated on the floor of the Senate that the commuter system is "a creature of administrative ingenuity without a statutory base." 117 Cong. Rec. 7660 (1971). He said that the system "does not carry out" "a major thrust of the immigration laws [which] has always been to protect the working conditions and job opportunities of American workers." *Ibid.* "I don't believe aliens should be given the unique privilege of being considered *bona fide* immigrants for the purposes of employment in this country, when they choose to reside across the border and fail to become immigrants in the sense contemplated by law." *Ibid.*

In Senate hearings, Senator Mondale, Chairman of the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, and former Assistant Secretary of Labor Stanley Ruttenberg specifically discussed and rejected the Immigration Service's reenactment argument. Hearings on Migrant and Seasonal Farmworker Powerlessness, Part 5: Border Commuter Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. (1969). Ruttenberg, who had been Manpower Administrator and a member of the Select Commission on Western Hemisphere Immigration, said that "nothing in the legislation, nothing in the law condones or even established in any way the fact that a commuter may live in Mexico and work in the United States. *Id.* at 2530. Senator Mondale stated that the position of the Immigration Service concerning reenactment was "specious." *Id.* at 2544. He then went on to say (*id.* at 2544, 2594):

> [I]t is a very, very tenuous argument. It is one that you use when you want policy to come out that way, and apparently someone wanted it to come out that way.
>
> * * * *

> They have taken the position, apparently in the Justice Department, to the effect that * * * when we passed the 1965 act, we therefore incorporated it by reference.
>
> I think, as the Senator from New York knows, that *that was one of the most tenuous legal theories that one could go on, to let our legislatures ratify illegality when they adopt a ruling not dealing with the subject, but in the same generic area. That is basically the thin position of the Justice Department.* (emphasis added)

We submit that Senator Mondale was correct—that the Service's reenactment theory is without any sound basis. The history of the commuter practice and of Congress' response to it is, when considered most favorably from the standpoint of the Service, is inconclusive. It is simply impossible to know or even guess from this history what Congress would have done in 1952 or 1965 or would do today if the issues in this case were directly presented to it. We therefore submit that the legality of the commuter system must be determined on the basis of the most persuasive and controlling evidence of Congressional intent—the language of the Act.

B. Section 212(a)(14) Of The Act Requires That Commuters Obtain A Labor Certification From The Secretary Of Labor Before Entering The United States

1. *The Language of Section 212(a)(14) Applies to Commuters*

An immigrant may not be admitted to the United States unless the Secretary of Labor has certified, pursuant to Section 212(a)(14) of the Act, 8 U.S.C. 1182 (a)(14), that there are not sufficient domestic workers to perform such labor and that his employment would not adversely affect the wages of American laborers. Section 212(a)(14) is applicable to aliens "seeking to

enter the United States, for the purpose of performing skilled or unskilled labor" who come within Section 101 (a) (27) (A) of the Act, 8 U.S.C. 1101(a) (27) (A), *i.e.*, "an immigrant who was born in an independent foreign country of the Western Hemisphere."

Daily and seasonal commuters come within Section 101(a) (27) (A) because they were born in Mexico, and therefore the certification requirements of Section 212 (a) (14) are fully applicable. The Secretary of Labor has determined pursuant to Section 212(a) (14) and 29 C.F.R. 60.1, which was promulgated thereunder, that the supply of domestic farm labor is sufficient and that the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6. This decision was reissued on February 4, 1971, 36 Fed. Reg. 2463, 2466. The commuter alien employed as an agricultural worker or seeking such employment is therefore ineligible for admission to the United States.

Since the language of Section 212(a) (14) and 101(a) (27) is clear, there is no need to rely upon other aids to judicial construction. However, if the language is deemed ambiguous, we submit that both the purpose and legislative history confirm that Section 212(a) (14) applies to daily and seasonal commuters.

2. *The Purpose of Section 212(a)(14) Supports Its Applicability to Commuters*

Prior to 1952, American labor was protected by a provision excluding contract laborers and persons induced or assisted to come to the United States. However, the "contract labor clauses" were omitted from the Immigration and Nationality Act of 1952 and Section 212(a) (14) was added. 66 Stat. 183. The purpose of the new provision was to provide more adequate pro-

tection for American labor (H. Rep. No. 1365, 83d Cong., 2d Sess. 50 (1952)):

> It is the opinion of the Committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

See also S. Rep. No. 1137, 82d Cong., 2d Sess. 11 (1952).

Unfortunately, Section 212(a)(14) proved ineffective in practice. It allowed immigrants to enter the United States unless the Secretary of Labor certified that the entry of the immigrants would harm American labor. 66 Stat. 183. Stanley H. Ruttenberg, then Assistant Secretary of the Department of Labor, described the operation of Section 212(a)(14). Review of the Operation of the Immigration and Nationality Act as Amended by the Act of October 3, 1965, Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 111 (1968):

> Under the old provision, the Department of Labor was able to prevent undue competition with U.S. workers and adverse effects on their wages and working conditions only on rare occasions.

Congressional concern over the ineffectiveness of Section 212(a)(14) was reflected in the 1965 amendments to the Immigration and Nationality Act which radically changed the operation of Section 212(a)(14). Under the new section, the burden of initiating the certification process was removed from the Secretary of Labor and placed on the entering alien. He can now enter the United States only if the Secretary of Labor determines that his entry will not harm American labor. Under the new provision, the Secretary has with one determination found that domestic farm labor would be threatened

by the entry of foreign agricultural workers. Schedule B, following 20 C.F.R. 60.6.

After calling Section 212(a)(14) "the major safeguard for American labor," Gordon and Rosenfield go on to say (Sec. 2.40):

> The 1965 amendments made a radical change in the statute, in order to strengthen the controls protecting American labor.
>
> * * * *
>
> The 1965 amendments obviously represent a dramatic reversal of course for the immigration policy of the United States. Previously those seeking economic opportunities had been encouraged to come. On and after December 1, 1965, access to employment opportunities in the United States has been severely curtailed.

The Immigration Service claims that commuters are only subject to the Secretary of Labor's labor certification on their initial entry into the country. Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Labor Problems before Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 1976 (1969). Thereafter, according to the Immigration Service, they are immigrants returning from a temporary visit abroad (Section 101(27)(B)) rather than immigrants born in the Western Hemisphere (Section 101 (27)(A)).

The majority of commuters initially sought entrance to the United States between 1952 and 1965. Most entered the country during the period when Section 212(a)(14) was virtually ineffective. Thus, the practical effect of the Immigration Service's interpretation of Section 212(a)(14) is that most commuter aliens who freely cross our borders to work have never been subject to the labor certification requirement. They continue to

enter the United States to perform agricultural labor even though the Secretary of Labor has determined that there is a surplus of domestic labor and the entry of immigrants to perform such labor harms the wages and working conditions of domestic labor.

Exemption of the commuter from Section 212(a)(14) as an immigrant returning from a temporary visit abroad defeats the stated purpose of that provision to protect domestic workers from competition with foreign labor. All immigrants entering the United States to work must obtain a labor certification on their initial entry. The immigrant who establishes a permanent residence in the United States is not subject to the certification thereafter on his return from "a temporary visit abroad" because he has himself become a domestic American worker. The commuter should be subject to the certification at every entry because he never ceases to be a foreign worker. Living in a foreign economy he is not subject to the same expenses as the American worker. The lower wages which he will thus accept, the working conditions that he will endure, are the very conditions which Section 212(a)(14) was meant to prevent.

3. *The Legislative History of Section 212(a)(14) Supports Its Applicability to Commuters*

The legislative history of Section 212(a)(14) indicates that the commuter is the very prototype of foreign worker against whom the section was meant to protect. The House Judiciary Committee's analysis of Section 212(a)(14) stated (H. Rep. No. 745, 89th Cong., 1st Sess. 21 (1965)):

> [Section 212(a)(14] is restated so as to require an affirmative finding by the Secretary of Labor that *any alien* seeking to enter the United States as a worker, skilled or otherwise, will not replace a worker in the United States nor will the employment of

> such alien adversely affect the wages and working conditions of individuals in the U.S. similarly employed. (emphasis added)

Congressman Cellar, the long-time Chairman of the House Immigration and Naturalization Committee and manager of the 1965 amendments to the Immigration Act during floor debate, was adamant that every alien coming from the Western Hemisphere to work in the United States must obtain a labor certification (111 Cong. Rec. 21591 (1965)):

> [I]n each instance, in every single instance there must be issued by the Secretary of Labor a certificate to the effect that as to the person coming from the Western Hemisphere, his coming will not have the effect of depressing wages or adversely affecting the conditions of employment.

Although the Committee report accompanying the amendment did not mention the commuter by name, Senator Kennedy, its Floor Manager, and Charles Gordon, the Service's General Counsel, had a long discussion concerning the applicability of Section 212(a)(14) to commuters during Senate hearings subsequent to adoption of the amendments. First, Senator Kennedy said that the exclusion of commuters from the labor certification would blatantly circumvent the intent and scope of the 1965 amendments (Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 6 (1967)):

> What we are really interested in by the adoption of those provisions [212(a)(14)] is not that we are just trying to keep someone out of the United States but that we would not have the effect of depressing wages and working conditions of American nationals.
>
> Clearly, where we see individuals [commuters] being able to come into the United States and cir-

> cumvent the intent and scope of this legislation, it is a matter of considerable distress.

Senator Kennedy expressed amazement that Mr. Gordon was exempting the commuter from the certification requirements of Section 212(a)(14) by relying on an interpretation of returning immigrant in Section 101(a)(27)(B) which Gordon had himself termed "a fiction." *Id.* at 56.

In short, the legislative history, as well as the language and purpose of Section 212(a)(14), make clear that it applies to commuters whenever they enter the United States.

4. *The Board of Immigration and Naturalization Appeals Has Held That Section 212(a)(14) Applies to Commuters*

In *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114 (D. D.C., 1960), the district court held that commuters were subject to the Secretary of Labor's certification under Section 212(a)(14). The Secretary of Labor had certified that the admission of any alien for employment at the Peyton Packing Company of El Paso, Texas, would adversely affect domestic workers. Despite the Secretary's certification, the Immigration Service continued to allow commuters to work at the plant as immigrants "lawfully admitted for permanent residence returning from a temporary visit abroad." The court concluded that to exempt the commuter from the Secretary's certification by calling him a returning resident was to make a "shambles" of the certification requirement (*id.* at 119):

> But when the Secretary of Labor has issued a certification under § 212(a)(14) pertaining to particular employment, such an alien would be excludable. It is not sufficient to resort to an "amiable fiction" to justify a wholesale evasion of the Secretary's cer-

tification—Mexican commuters destined for the employment covered by the certification must be excluded just as any other Mexican non-resident alien. To do otherwise would be to permit administrative practice to make a shambles of a provision which with § 101(a)(15)(H), was newly designed by the 1952 Act in order to assure "strong safeguards for American labor."

The facts of *Matter of J—— P——*, 9 I. & N. 591 (1962), are symptomatic of the entire commuter problem. The alien, a Mexican national, had attempted to live in El Paso, Texas, rather than commute to the Peyton Packing Company in El Paso. The wages at the Peyton plant were so low, however, that he could not afford to live in El Paso and he moved back to Mexico. From his home in Mexico, he continued to work for Peyton daily, acting as a strikebreaker against the domestic workers at the plant and helping to lower their wages to a level on which a resident of the United States could not survive. *Id.* at 593. The Board of Immigration Appeals held that the commuter could not enter the United States to work at the Peyton plant but said that this determination was dictated by the district court decision in *Amalgamated* and did not apply generally. *Id.* at 594.

The Board has subsequently restated this holding as a principle applicable to all commuters. *Matter of Bailey*, 11 I. & N. 466 (1965). There the Board broadened the definition of commuter because it found that domestic labor was already adequately protected from the commuter by the Secretary of Labor's certification under Section 212(a)(14). *Id.* at 467, 471, note 2.

Thus, the Board of Immigration Appeals has concluded that, even though commuters can utilize green cards to enter the United States, they still can only enter when the Secretary of Labor has not certified that their em-

ployment will harm American labor. Since the Secretary of Labor has found that commuters who enter the United States to perform agricultural labor are harming American labor, commuters are not entitled to enter for this purpose. In short, both daily and seasonal commuters are barred from entry pursuant to green cards, immigrant visas or any other documents as long as there is no shortage of domestic agricultural labor and their entry is adversely affecting wages and working conditions for these domestic workers.

II

MOST COMMUTERS ARE PROPERLY NON-IMMIGRANTS WHO MAY NOT BE ADMITTED INTO THE UNITED STATES UNLESS THE SECRETARY OF LABOR DETERMINES THERE IS A LABOR SHORTAGE

We assumed in Part I above that commuters are immigrants and contended that they are required to have an immigrant visa and a labor certification from the Secretary of Labor in order to enter the United States. We submit, however, that the large majority of the Mexican nationals involved in this case are non-immigrants under Section 101(a)(15(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii), rather than, as the Section treats them, as immigrants.

If commuters are non-immigrants, they cannot enter the United States to perform agricultural labor. Subsection (H)(ii) allows non-immigrants to enter the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country." The Service's own regulations allow these non-immigrants to enter the United States only if the Secretary of Labor issues a certification that domestic labor is not available

and that employment of the alien will not adversely affect the wages and working conditions of American workers. 8 C.F.R. 214.2(h)(2)(ii). Department of Labor regulations provide that non-immigrants may only enter the United States pursuant to this subsection if the prospective employer satisfies criteria established by the Secretary of Labor, including that he has attempted to recruit farmworkers locally; has offered wages, housing, and other fringe benefits at specified levels; and has abided by state and local labor, health, and housing laws. 20 C.F.R. 602.10, 602.10a, 602.10b. Since there is no shortage of unskilled farm labor in the western United States, the Secretary of Labor has not issued certifications under Subsection (H)(ii) since 1967 to allow Mexican aliens to enter the United States to work as farm laborers and therefore Mexican nationals are not admissible for such employment. Department of Labor, Rural Manpower Development, p. 20 (Fall 1973).

A. Most Commuters Coming To The United States Are Properly Non-Immigrants

The Immigration and Nationality Act defines an immigrant as an alien not coming within the ten categories of immigrants. Section 101(a)(15), 8 U.S.C. 1101(a)(15). Section 101(a)(15)(H) defines as a non-immigrant:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *.

We submit that this provision on its face requires the Service to consider all seasonal commuters and those daily commuters who do not come to a permanent job in the United States as non-immigrants who must satisfy the criteria of Subsection (H) and the Department of Labor's regulations in order to enter the United States. As the court below held (Gov. Pet. App. A, pp. 22-23):

> Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Seasonal commuters involved in this case come clearly within that section.

The same reasoning equally applies to those daily commuters who come to the United States daily only during the agricultural season.[15]

Congress intended in the Immigration and Nationality Act of 1952 to differentiate carefully between immigrants coming ito the United States for permanent residence and non-immigrants coming temporarily (H. Rep. No. 1365, 82d Cong., 2d Sess. 36-37 (1952)):

> The immigrant class includes those aliens who seek to enter the United States for permanent residence, while the non-immigrant class includes those aliens who seek to enter for temporary periods of stay.

Congress therefore in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily "to perform services or labor," which exactly describes the situation of the commuter worker. The purpose of the provision was to allow the admission of workers to

---

[15] The Service claims (Gov. Br. 21) that it "has consistently construed the subsection [(H)(ii)] as not encompassing an alien who, like the commuter, comes to the country to perform a job of a permanent character, even though the period of service is limited." The Service does not explain how seasonal agricultural work can be deemed permanent. Daily and seasonal commuters, who enter the country only during the agricultural season, enter temporarily themselves, provide only temporary services or labor, and work at temporary jobs.

alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." *Id.* at 44-45.

In deciding to add Subsection (H) to the Act, Congress was heavily influenced by the impact of alien labor on domestic agricultural labor, the very subject involved in this case S. Rep. No. 1515, 81st Cong., 2d Sess. 586, 590 (1950). Officials of the Immigration and Naturalization Service had indicated to the Judiciary Committee that there was a shortage of domestic farm labor. *Id.* at 586. On the other hand, both labor and farm organizations had testified to the adequacy of domestic labor and the adverse effects on domestic labor of importing alien agricultural laborers. *Ibid.*; Joint Hearings on S. 716, H.R. 2379 and H.R. 3816, "Bills to Revise the Laws Relating to Immigration, Naturalization and Nationality" Before the Subcommittee of the Committee on the Judiciary, 82d Cong., 1st Sess. 119-122, 664 (1951). A spokesman for the American Federation of Labor told the Subcommittee that importation of Mexican labor was particularly injurious to American workers (*id.* at 663):

> The Mexican immigration into this country has tended to increase since the turn of the century. They have accepted wages much lower than the native American and have been displacing American agricultural labor and railroad labor. Our wages in agriculture are still notoriously low, but as long as it is possible to get "cheap" foreign labor, there is little likelihood of it being raised.

Weighing the conflicting testimony, Congress added Section 101(15)(H) which allowed for temporary admission of agricultural labor but only after a determination had been made that such labor was not available in this country. S. Rep. No. 1515, *supra*, p. 586.[16]

---

[16] The only explicit references to the commuter system in Senate Report No. 1515 came under headings involving non-immigrants.

We submit that the large majority of daily and seasonal commuters involved in this case come clearly within Section 101(a)(15)(H). Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. *Hess* v. *Esperdy*, 234 F. Supp. 909, 911 (S.D. N.Y., 1964); 1 Gordon and Rosenfield, 1 *Immigration Law and Procedure*, Sec. 214a (rev. ed., 1973). Commuters have residences in a foreign country which they have no intention of abandoning and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Thus, Subsection (H) applies to all seasonal commuters and to those daily commuters who commute only during the agricultural season.

Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.[17] However, most daily commuters who work as agricultural laborers, like seasonal agricultural commuters, work only during the agricultural season and therefore fall within Subsection (H). Moreover, Subsection (H) applies to all daily commuters who change employers, even if they work all of the year in

---

Id. at 535-536, 616. The Service quotes (Gov. Br. 54) from this report a statement that commuters are immigrants. Since that statement is part of a description of current immigration practices prior to the 1952, that statement is fully consistent with plaintiffs' position. We contend that the 1952 Act, by adding Section 101(a)(15)(H), made commuters non-immigrants.

[17] The court below correctly concluded (Gov. Pet. App. A, p. 23, note 13):

> Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

the United States, since both their visits and the services they perform are temporary.

In its 1955 Report on the Administration of the Immigration and Nationality Act, the House Committee on the Judiciary explicitly stated that seasonal workers should be considered as non-immigrant temporary laborers under Section 101(a)(15)(H)(ii) (Report on the Administration of the Immigration and Nationality Act by the House Committee on the Judiciary, Part II, p. 131 (1955)):

> The Special subcommittee is of the opinion that the economic development of the Virgin Islands of the United States could be further enhanced by a more realistic and expeditious application of subdivision (H)(ii) of Section 101(a)(15) of the Immigration and Nationality Act, which would permit the temporary employment of natives of the British island of Tortola at jobs which become available at specified seasons, either in agriculture or in the tourist (hotel) industry. *The language of this section has been construed by the immigration officials in such manner that these hotel and agricultural workers are considered permanent workers. It is the sense of the Subcommittee that this interpretation is too restrictive, and that Congress intended that workers employed in seasonally available jobs should be considered as temporary workers.* (emphasis in original)

The Immigration Service has itself quoted the Judiciary Committee's Report to substantiate the fact that seasonal workers are temporary laborers coming within Section 101(a)(15)(H). "Employment of Western Hemisphere Natives as Temporary Workers," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 96 (1968). Moreover, the Immigration Service told the Commission, in direct contradiction of the facts, that:

> Since the termination of the "bracero" program on December 31, 1964, the importation of Mexican temporary agricultural laborers has been accomplished in accordance with the provisions of section 101(a)(15)(H)(ii) and 214(c) of the Immigration and Nationality Act, and implementing regulations in 8 C.F.R. 214.2(h).

And Gordon and Rosenfield state (1 *Immigration Law and Procedure*, Sec. 6.9 (rev. ed. 1973)):

> Since the expiration of the special legislation dealing with the braceros, the normal immigration procedure for the importation of temporary workers does offer the only legal avenue for obtaining temporary agricultural workers from Mexico.

Despite the specific direction of the Judiciary Committee to treat seasonal workers as non-immigrants and the Service's claim that it was doing so, the Immigration Service broadened the daily commuter concept to include seasonal workers after the end of the bracero program in 1964. As the court of appeals found, "the Service after the termination of the bracero program in 1964 created a new class of commuters—a 'new immigrant', the seasonal worker" and this "metamorphasis of the bracero to seasonal commuter is directly inconsistent with Congress' purpose in ending the bracero program in order to eliminate its adverse impact on American workers." Gov. App. A, p. 20.

Congress agreed in 1963 to terminate the bracero program at the end of 1964. 109 Cong. Rec. 15203, 23155, 23222 (1963). The reason that the program was not extended was, as Senator Proxmire stated, because of the adverse impact of the bracero program on domestic American labor (*id.* at 15187):

> [T]hose who believe in free enterprise in America, who believe in the law of supply and demand, should not support a governmental policy subsidized

> by the American taxpayers that imports foreign workers at a time when there is considerable unemployment, and when the effect of the importation is to keep the wages of domestic workers from rising.

Secretary of Labor Willard Wirtz described the termination of the bracero program (Report of the Secretary of Labor, "Year of Transition—Seasonal Farm Labor—1965," pp. 2, H-2 (1965)):

> The drastic reduction in the use of foreign farm labor in 1965 reflected the recognition that continuation of the previous practice would have been totally inconsistent with the contemporary national decision to perfect the American social and economic order.
>
> * * * *
>
> There has been increasing complaint against the importation of these hundreds of thousands of foreign workers—being paid wage rates as low as 60 cents an hour—while about four million U.S. men and women are unemployed.
>
> There has also been accumulating evidence that U.S. workers will be available to do this work if decent working conditions are provided and if it is paid for on terms in line with those for other work that is equally hard and unpleasant.
>
> The 88th Congress, taking these facts into account decided to terminate Public Law 78.

Congress felt that American agricultural workers would be better protected if the bracero program was eliminated and future bona fide labor needs were supplied by non-immigrants entering under Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (109 Cong. Rec. 15187):

> I [Senator Proxmire] would like to eliminate Public Law 78 [the bracero program]. Then it would be possible, under present policies which have been followed by the Department of Labor since June of

> this year, to limit the number coming in under Public Law 414 [Section 101(a)(15)(H)] to provide for the legitimate need for additional Mexican workers.

Secretary Wirtz promised that, "There will be no administrative extension of the situation existing under Public Law No. 78." Report of the Secretary of Labor, *supra*, p. H-3. Mr. Wirtz stated that "proposals to extend Public Law 78 by administrative action of one kind or another fly squarely in the face of the decision made by Congress. These proposals must be, and they are, rejected." *Id.* at H-2.

Despite Secretary Wirtz's position, the Immigration Service blatantly ignored the Congressional mandate to consider seasonal workers as non-immigrants. James S. Hennessy, Assistant to the Commissioner of the Service, admitted that the seasonal workers are in fact exbraceros (Hearings on Employment of "Green Card" Aliens During Labor Disputes before the Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 73 (1969)):

> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

See also pp. 49-51 above.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress' purpose in ending the bracero program to eliminate its adverse impact on American workers. While inadequate, the bracero program had many protections designed to protect domestic labor. See p. 50 above. In contrast, the exbracero as a commuter immigrant enters and leaves the United States freely, subject to none of the many safe-

guards for domestic labor which characterized the bracero program prior to its termination in 1964. Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 126 (1967); Hearings on Migrant and Seasonal Farmworkers Powerlessness; Part 5: Border Commuter Labor Problems before the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2586 (1969).

The Service contends (Gov. Br. 19-21) that commuters cannot be non-immigrants because "unemployed persons capable of performing such services or labor cannot be found in this country" as Subsection (H) requires if the non-immigrants are to enter the United States. We submit, however, that aliens satisfy the definition of non-immigrants under Subsection (H) if they are "coming temporarily to the United States to perform temporary services or labor." Therefore, any commuters, like any other aliens, who have a residence in a foreign country which they have no intention of abandoning and who come temporarily to the United States to perform temporary labor are non-immigrants. However, if such non-immigrants desire to perform labor which unemployed persons in the United States can perform, Subsection (H) does not allow them to enter the country. There is nothing strange in an interpretation of the statute which classifies commuters and other aliens in a way which does not allow them to come to the United States. As we have seen, the reason for Subsection (H), like many other provisions of the immigration laws, was to protect American labor from competition from foreign workers.

The Service's position is inconsistent with the basic structure of the immigration laws. As Subsection (H) indicates, non-immigrants are essentially persons who come to the United States for a temporary period. Im-

migrants are basically persons who seek to enter the United States to obtain permanent residence. The Service's position, however, would make the determination whether aliens are immigrants or non-immigrants depend not on whether they are coming temporarily but rather on whether there are unemployed persons in the United States who can perform the services or labor involved. Thus, aliens would be classified differently based on differences in occupations or even differences in the time when they desire to enter depending on the determination of the Department of Labor concerning employment conditions. It is clearly much more consistent with the Act to consider the phrase in Subsection (H)(ii) relating to the temporary nature of the visit as defining the class of non-immigrants and the phrase relating to unemployed persons as determining which of the non-immigrants would be allowed to enter the United States. This is parallel to the Act's provisions relating to the entry of immigrants which in Section 214(a) restricts their entry on an almost identical basis as Subsection (H)(ii).

In any event, even if the Service is correct and commuters are not non-immigrants under Subsection (H) because there are unemployed persons capable of performing these services or labor, the legislative history described above still demonstrates that most commuters cannot enter the United States as immigrants. Congress clearly intended Subsection (H) to govern the entry of all commuters who were coming to temporary employment in the United States which includes all seasonal commuters and those daily commuters who come only during the agricultural season. Therefore, if these commuters cannot qualify for entry as non-immigrants under Subsection (H), Congress neither expected nor intended that they could freely enter this country, despite the existence of ample domestic farm labor, as immigrants under Section 211(b).

The Service contends (Gov. Br. 22-23) that, even if commuters come within Subsection (H), an alien must voluntarily seek non-immigrant status and it cannot be forced on him. Plaintiffs do not, however, seek to force any alien to seek to enter the United States under any particular provision of the Act. We simply contend that the Service is required to apply provisions of Subsection (H) if a commuter desires to enter the United States. Both the language and history of Subsection (H) show that this is what Congress intended.

Plaintiff's position is fully consistent with the history of the immigration laws. When Congress in 1924 designated temporary visitors "for business or pleasure" as non-immigrants (Immigration Act of May 26, 1924, Sec. 3, 43 Stat. 153), the Immigration Service considered daily commuters to come within this provision because of their temporary contact with the United States. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 178 (1963).

In 1927, the Service reversed its position and found that commuters were not "temporarily visitors for business." General Order 86, April 1, 1927, p. 1. The Service's position was upheld by this Court in *Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231 (1930). The Court concluded that the word "business" should be interpreted to mean "intercourse of a commercial character" and not "labor for hire." *Id.* at 244. Since any alien coming to the United States is deemed an immigrant "unless he can bring himself within one of the exceptions" for non-immigrants (*id.* at 243), the Court concluded that daily commuters were automatically to be considered as immigrants. Thus, the Court did not question or even consider the temporary nature of the commuter's contact with the United States.

In the Immigration and Nationality Act of 1952, Congress reenacted in Section 101(a)(15)(B) the "business or pleasure" provision of the 1924 Act. In addition, Congress enacted Section 101(a)(15)(H) as a new category of non-immigrant. As Gordon and Rosenfield point out (1 *Immigration Law and Procedure*, Sec. 2.14a (rev. ed. 1973)), Subsection (H) was intended to allow aliens coming temporarily to the United States for employment to enter as non-immigrants, just as this class had been able to do before the Service's 1927 regulations which were upheld in *Karnuth ex rel. Albro*. Consequently, Subsection (H), as its language clearly shows, restored the situation existing prior to 1927 when commuters were considered as non-immigrants.

Moreover, the decision in *Karnuth ex rel. Albro* was explicitly based on the purpose of the Immigration Act "to protect American labor against the influx of foreign labor." 279 U.S. at 243. At that time, there were no limitations on the entrance of non-immigrants while a quota had recently been imposed for immigrants. Consequently, when the Court held that commuters were immigrants, it was protecting American labor. Today, however, since Subsection (H) was enacted for the purpose of protecting American labor and specifically restricts non-immigrants from entering the United States for employment unless no other labor is available, it is consistent with both this Court's rationale for its 1930 decision and the purpose of the immigration laws to find that Subsection (H) covers commuters.

B. Commuters, Who Originally Entered As Immigrants But Are Properly Non-Immigrants, Should Be Reclassified As Non-Immigrants

It is clear that all seasonal and most daily commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)

(15)(H). It is also plain that commuters who have previously come to the United States as immigrants admitted for permanent residence must be considered as non-immigrants.

First, commuters who have come since adoption of Subsection (H) in the 1952 Act should have been considered as non-immigrants when they first entered. As the court below held (Gov. Pet. App. A, p. 23, note 14), the Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status.

Second, whether or not commuters came to the United States for the first time prior to adoption of Subsection (I') in 1952, they now must be considered as non-immigrants. The court of appeals correctly concluded (Gov. Pet. App. A, p. 23, note 14). "The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958)." See also Besterman, "Commentary on the Immigration and Nationality Act" in 8 U.S.C. 1 to 1280, p. 46 (1954); 1 Gordon and Rosenfield, *supra*, Sec. 2.19. This doctrine has been specifically applied by the Board of Immigration and Naturalization Appeals to commuters. *Matter of Estrada-Tena*, 12 I. & N. 422 (1967); *Matter of Moore*, 13 I. & N. 711 (1971).

Consequently, when a commuter enters the United States today, the legality of this entry must be determined as of that time. Even if the commuter entered legally one or many times before as an immigrant, his entry must be reevaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

The fact that commuters originally were admitted for permanent residence does not mean that they automatically continue to have that status. Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), makes clear that an immigrant coming to the United States for permanent residence does not acquire permanent and irrevocable status:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.* (emphasis added)

Secretary of Labor Wirtz testified before the Senate Subcommittee on Immigration and Naturalization that it was the intent of Congress that if an alien did not establish his permanent residence in the United States, his immigrant status should be discontinued. Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 24 (1967). Since most commuters never became permanent residents, they never actually had this status. And since all commuters have no permanent residence in the United States, they do not have this status today.

Officials of the Immigration and Naturalization Service have told Congressional committees that, if a commuter is admitted to the country as an immigrant for permanent residence, this privilege is permanent. In 1963, L. Paul Winings, then General Counsel of the Service, explained to a subcommittee of the House Committee on the Judiciary that the alien has "paid [his] way into the ballpark." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, pp. 167-168 (1963). Six

years later, Charles Gordon, the Service's General Counsel, made a similar statement to a perplexed Senate Subcommittee on Immigration and Naturalization that commuters continue to have "the privilege of establishing residence." Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 63 (1967). Members of the committees rejected these interpretations at both hearings. *Id.* at 62-63; Study of Population and Immigration Problems, *supra*, pp. 168-169.

Contrary to the position of the Service, the Board of Immigration and Naturalization Appeals has specifically held that the language of Section 101(a)(20) relating to change of status includes changes of status from immigrant to non-immigrant. *In the Matter of M—— P——*, 9 I. & N. 747, 749 (1962); *In the Matter of S——*, 6 I. & N. 392 (1954). The latter decision was approved by the Attorney General in 1955. *Ibid.* See also *Matter of Marcos*, 11 I. & N. 740 (1966); *In the Matter of T——*, 6 I. & N. 778 (1955); *In the Matter of M——*, 5 I. & N. 642, 647 (1954). Consequently, it is clear that immigrants do not maintain the status of a permanent resident alien under Section 101(a)(20) if they in fact do not have a residence in this country.

If residence in this country has nothing to do with immigrant status, as Immigration Service officials have suggested, then logically the commuter is no different from any other immigrant alien. However, the Immigration Service itself does not treat commuters like other immigrants who are actually permanent residents of this country.

First, if a commuter is not employed in this country for a period of six consecutive months, the Service pur-

portedly removes his immigrant status.[18] *E.g., In the Matter of L——*, 4 I. & N. 454, 456 (1951); *Matter of M—— D—— S——*, 8 I. & N. 209 (1958); *Matter of Smith*, 11 I. & N. 738 (1966); *Matter of Wighton*, 13 I. & N. 683 (1970); Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973); Stipulation, Gov. Pet. App. D, p. 35. This rule is not applicable to non-commuter immigrants with actual residences in the United States.

Second, the Service's regulations provide that aliens may not cross the border using a Form I-151 to accept employment at a place where the Secretary of Labor has determined that a labor dispute exist. 8 C.F.R. 211.1(b)(1). The Service has interpreted this regulation to bar any daily commuters or many seasonal commuters from working for such an employer. Stipulation, Gov. Pet. App. D, pp. 35-37. Again, this rule does not apply to immigrants who are bona fide permanent residents of the United States. 1 Gordon and Rosenfield, *supra*, Sec. 2.30 (1973 Supp.).[19]

Third, commuters, unlike immigrants with actual residences in this country, are not eligible for naturalization. 8 U.S.C. 1427 requires for naturalization that an alien have residence:

---

[18] The Service, however, has great difficulty enforcing this rule because of its lack of information concerning which aliens crossing the border are commuters and when they last worked in the United States.

[19] This provision was held invalid in *Sam Andrews' Sons* v. *Mitchell*, 457 F.2d 745 (C.A. 9, 1972). However, the Service is enforcing the provision other than in the Ninth Circuit. See Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973). The validity of this provision is not now before this Court since it was not decided below.

> continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time * * * [and have] resided continuously within the United States from the date of the petition up to the time of admission to citizenship * * *.

Commuters cannot be naturalized since they are not residents of the United States. *Petition of Wright*, 42 F. Supp. 306 (E.D. Mich., 1941); *Petition of Correa*, 79 F. Supp. 265 (W.D. Tex., 1948); Statement of L. Paul Winings, then General Counsel of the Immigration and Naturalization Service, in Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 180 (1963); Statement of Assistant Secretary of Labor Stanley H. Ruttenberg, Hearings on the Impact of Commuter Aliens Along the Mexican and Canadian Borders before the Select Committee on Western Hemisphere Immigration, Part I, pp. 14-15 (1968). "An alien commuter may not proceed toward naturalization until he has taken up actual permanent residence in the United States for the required statutory period." Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973).

In short, the Mexican nationals involved in this case are commuters and not permanent resident aliens. As such, they come to the United States temporarily to provide temporary services and labor. They are therefore properly non-immigrants governed by the provisions of Section 101(a)(15)(H) and may not enter the country as immigrants using green cards.

III

THE ISSUES IN THIS CASE SHOULD BE RESOLVED BY THIS COURT

The Service contends (Gov. Br. 63) that "[t]he nature of the problem [in this case] makes it peculiarly suited for legislative, rather than judicial, resolution." In doing so, it emphasizes the effects that the end of the commuter system will have on Mexico and Canada, on our relations with these countries, on employers, and on the commuters themselves.

We agree that the end of the commuter system will have important effects.[20] In Appendix A, pp. 94-97 below, we note that the present commuter system undermines wages, working conditions, the availability of employment, and the opportunity to organize in unions for domestic farm labor. In a proper forum, we would be prepared to show that the commuter system, as a practice of sound public policy, should be abolished. However, we have not attempted in this brief to prepare a comprehensive rebuttal to the Service's position because we believe that these arguments relating to government policy, rather than the meaning of the statute, are not properly before this Court.

---

[20] The Service, however, has exaggerated these effects. It is untrue that the commuters could burden American border communities by simply deciding to become residents of the United States. In fact, commuters who engage in agricultural labor could not enter the United States because, as we have seen (pp. 19, 74), the Department of Labor does not certify either immigrants or non-immigrants to enter this country for that purpose because there is no shortage of domestic farm labor. Similarly, agricultural and other employees should be able to obtain labor within the country to replace the commuters since the Secretary of Labor's determinations are based on the fact that there is an adequate supply of domestic farm labor.

We submit that the issues in this case are no more legislative than those in numerous other cases which constantly come before and are decided by this Court. Whenever this Court considers complex and important questions of statutory construction, it can fairly be said that the issues are legislative. This is true in the sense that Congress can properly weigh the competing interests involved and determine, as a matter of public policy, the appropriate result. It is also true in the sense that these are matters which are within the power of Congress to resolve, unlike questions relating to construction of the Constitution. If the courts determine the meaning of the statute in a manner inconsistent with the will of Congress, then Congress can amend it.

Similarly, here, there can be no doubt that Congress could pass a provision of the immigration law specifically determining the right of commuters to enter the United States. Instead, Congress has passed provisions which deal generally with the entry of all aliens without specific reference to commuters. The issues in this case involve the effect of these provisions on the particular situation of commuters.

Here, this Court, like the courts below, is called upon to exercise its customary responsibility to interpret a federal statute. Plaintiffs submit that the language of the Act makes commuters non-immigrants or, if they are immigrants, requires that they possess immigrant visas. The Service interprets the language of the Act differently. We submit that the entire judicial history of this country clearly demonstrates that this kind of issue involving the meaning of statutory language is properly resolved by the courts. This history likewise shows that the duty of the courts is to determine the intent of Congress, particularly from the language of the statute itself, rather to weigh the policy issues involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below in No. 73-300 should be affirmed and the judgment below in No. 73-480 should be reversed.

Respectfully submitted,

BRUCE J. TERRIS
JOHN W. KARR
JOSEPH ONEK

Attorneys for Respondents in No. 73-300 and for Petitioners in No. 73-480

April 1974